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DIVORCE LAW REFORM?

"Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time."

Cornford, *Microcosmographia Academica*.

THE Report of the Royal Commission on Marriage and Divorce¹ which was published in March 1956 covers a considerable variety of topics and deals extensively with a large number of technical problems in the laws of England and of Scotland. An immense amount of painstaking labour has gone into the analysis of the existing law, into a minute discussion of the evidence submitted to the Commission, and into the attempt to justify the recommendations, both negative and affirmative, at which the Commission arrived. Lawyers, both on the practising and on the teaching side of the profession, will have to spend many hours perusing and digesting the Report, but will feel rewarded by so convenient a presentation of so much useful material. Yet, many readers of this Report will deplore that so little has been done to elucidate the relevant social facts, that so little account has been taken of modern psychological and sociological thought, and that a precious opportunity has been missed of clarifying the policies which underlie the existing law and which should govern its reform. The Report will hardly be held up to future generations as an example of those great epoch-making State Papers which, through the boldness of their approach and the width of their perspective, proved to be formative elements in social and in legal history.

The Royal Commission was appointed

"to inquire into the law of England and the law of Scotland concerning divorce and other matrimonial causes and into the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife, and to consider whether

¹ Cmd. 9678, ix and 405 pp. H.M.S.O. 11s. 6d.—For an excellent critical discussion of the historical background see O. R. McGregor, *The Morton Commission: A Social and Historical Commentary*, British Journal of Sociology, Vol. VII (1956), p. 171.

any changes should be made in the law or its administration, including the law relating to the property rights of husband and wife, both during marriage and after its termination (except by death), having in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children; and to consider whether any alteration should be made in the law prohibiting marriage with certain relations by kindred or affinity."

It will be seen that the Terms of Reference enabled the Commission to cast its net wide.² Thus the Report covers not only the Grounds of Divorce,³ but also—to some extent—those of Nullity,⁴ quite apart from the special problem of prohibited degrees⁵ expressly mentioned in the Terms of Reference, and "Other Remedies"⁶ in the High Court, *e.g.*, Separation. The Commission proposed improved methods of Marriage Guidance and of Conciliation⁷ and made specific and important recommendations to give greater significance to Child Welfare in matrimonial proceedings and with regard to Custody in general.⁸ It devoted much attention to Matrimonial Maintenance and Maintenance for Children,⁹ including the Enforcement of Maintenance Orders, both in the High Court¹⁰ and in Magistrates' Courts,¹¹ and the validity and effect of Separation and Maintenance Agreements.¹² It re-examined the problems of Matrimonial Property,¹³ gave some thought to the structure of the court dealing with Matrimonial Causes¹⁴ and a detailed analysis to Matrimonial Jurisdiction in the international sense and the Recognition of Foreign Jurisdictions.¹⁵ In accordance with the Terms of Reference it went into the substantive and procedural law applied in Matrimonial Proceedings in Magistrates' Courts,¹⁶ and it also covered more technical matters such as Damages and Costs¹⁷ and Procedure in the High Court and Court of Session.¹⁸ Some very important topics appear at the end as "Miscellaneous Matters."¹⁹

² In some respects wider than it actually did, *e.g.*, with respect to grounds of nullity in Part II, and (very much more importantly) the Guardianship of Infants Acts in Parts V, VII and XIV. See No. 364. It is not easy to see why these statutes were regarded as being outside the Terms of Reference; their custody and maintenance provisions are most closely connected with matrimonial proceedings in fact.

³ Part I.

⁴ Part II.

⁵ Part XV.

⁶ Part III.

⁷ Part IV.

⁸ Part V.

⁹ Part VII.

¹⁰ Part VIII.

¹¹ Part XIV.

¹² Part X.

¹³ Part IX.

¹⁴ Part XI.

¹⁵ Part XII.

¹⁶ Part XIV.

¹⁷ Part VI.

¹⁸ Part XIII.

¹⁹ Part XVI: *e.g.*, the regrettable rejection of the proposal that *fili adulterini* should be legitimated by the marriage of their natural parents (seven members were however in favour of giving effect to the proposal; see Nos. 1182 *et seq.*); the recommendation to introduce the "putative marriage" into English law so as to make legitimate the children born of void marriages provided at least one parent was ignorant of the impediment (No. 1186); the recommendation that a bequest to or appointment in favour of a spouse should be invalidated on divorce or annulment (No. 1189); and the recommendation that, in an "Enoch Arden" situation, the fact that the spouse presumed dead is alive

No attempt will be made here to give a conspectus of the Recommendations of the Commission which are conveniently summarised at the end of the Report. The present paper is merely intended to discuss, in the light of the Report, some of the main aspects of divorce law, as well as some less important topics, like nullity and separation.²⁰ The proposals of the Commission on children and on maintenance are discussed elsewhere in this issue,²¹ and other features of the Report, especially the recommendations on property, on international jurisdiction and recognition, and on the law applicable in magistrates' courts, will have to be dealt with in a later number of this *Review*.

It is appropriate to follow the example of the Commission,²² and to start with some "general considerations."

MARRIAGE BREAKDOWN AND THE DIVORCE RATE

The Commission was conscious of facing a social problem of great importance—a social evil. The question which was required to be asked and answered in the first place was: what is this evil? Before its causes can be diagnosed, the disease must be identified, and before the causes have been diagnosed, no therapy can be prescribed.

What is the trouble? Is it that the number of divorces has risen or is it that more marriages have collapsed? The former is a fact which can be easily proved; the latter is a conjecture. What was the policy of the Commission: to devise ways and means for reducing the divorce rate for the sake of the reduction, or, to quote the Terms of Reference, "to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children," *i.e.*, to strengthen the stability of marriages and to reduce the number of marriage failures? If it was the latter, then the number of divorces was relevant only in so far as it was symptomatic for the number of marriage breakdowns.

Although one could have wished for a more explicit answer to this question, it is, on the whole, clear that the Commission was determined to identify marriage failure and not the swollen divorce rate as such as the disease for which a remedy had to be found. Thus, in the "General Considerations" introducing the discussion of divorce law there is a brief, an all too brief, attempt to analyse the social and cultural changes which might be considered as factors contributing to the alleged increase in the breakdown of marriages. Much more important, however, is Part IV of the Report which deals with measures for improved marriage guidance and education, and clearly envisages the evil

or was alive at the material time should not, in itself, be a ground for rescinding the decree presuming his death and dissolving the marriage (No. 1197).

²⁰ No. 1204: pp. 310–327 (England): pp. 328–339 (Scotland).

²¹ p. 601, *post*.

²² Nos. 34–54.

in terms of marriage failures. Nevertheless, one cannot be very confident that this was the policy of all the members of the Commission or that any of its members applied it consistently. There are two conflicting tendencies in this Report: one to promote healthy and happy marriages, the other to prevent divorce whenever possible, and if necessary to keep in being marriages which have ceased to be unions in any real sense of the word. The Commission insisted on perpetuating the doctrine of the "matrimonial offence,"²³ and about half of its members considered divorce almost exclusively as compensation given by one spouse for a wrong done by the other.²⁴ This led to recommendations which show little connection with a policy to promote stable marriages and which give the impression that the Commission or a large number of its members regarded it as their task to reduce the number of divorces *à tout prix*.

It was not of course as if the Commission had failed to see the difference between the two phenomena of marriage failure and of divorce. It pointed out that the increase in the divorce rate in this country is partly due to causes which do not in the least reflect a deterioration in the stability of marriages, such as the passing of the Matrimonial Causes Act, 1937, and improved facilities for legal aid.²⁵ This is but one example to show that it is superficial and misleading to use the number of divorces as a basis for conclusions about the number of marriage break-downs, or—even worse—about the state of sexual morality or of the respect for the institution of marriage. There is no evidence and it is intrinsically improbable that, before 1858, marriages were more stable in England where there was then practically no opportunity for a dissolution of a marriage than in Scotland where judicial divorce had existed for centuries. Or that marriages are less likely to fail in Italy where a marriage cannot be dissolved *a vinculo* than in France where divorce is comparatively easy. Or that a marriage is more secure in New York where adultery is the sole ground for divorce than across the River in New Jersey where a marriage can also be dissolved for cruelty or desertion, or even in New Mexico where "incompatibility of temper" is a ground for divorce.²⁶

It is, however, one thing to see that the number of failing marriages cannot be simply identified with the number of divorces and quite another to assess the symptomatic significance of the divorce rate in terms of the stability of marriages. The high

²³ No. 65.

²⁴ No. 69 (xii).

²⁵ No. 41.

²⁶ See Appendix III, Table 3, pp. 384 *et seq.* This line of thought is more fully developed in an unpublished article by Prof. M. Rheinstein, Professor of Comparative Law in the University of Chicago: "Marriage Stability and Laws of Divorce." The article is based upon research pursued at the University of Chicago Comparative Law Research Centre. The present writer is much indebted to this article which contains a masterly analysis of this topic.

temperature may not be the disease and we may also know that we shall not cure the disease by giving the patient aspirins, and yet the rising temperature may indicate the deterioration of the patient's health. The plain fact is that we know next to nothing about the true relationship between the divorce rate on the one side and the incidence of marriage failures on the other, and what the Commission says about it is largely based on intelligent guess-work and no more. There runs through the Report a confident assumption that the prospect of an easy divorce discourages people from exerting themselves to prevent the marriage from foundering. Perhaps so—but it is a guess, not a conclusion drawn from observed facts. Yet this assumption implies not only that the increase in the number of divorces permits a conclusion that more marriages collapsed, but also that the chance of obtaining a divorce is a contributory cause in the increase of the rate of marriage failures. From a rash assessment of the symptomatic importance of the divorce rate one can easily slide into postulating a causal connection for which there is no evidence at all.

Here again, however, in the analysis of the causes of marriage failures as in the identification of the evil itself the Commission seems to speak with two voices. On the one hand there are many indications that the Commission saw marriage failure as what it is: a psychological phenomenon of great complexity, influenced by the social, economic and cultural environment which the divorce law can hardly affect. Indeed the Commission unanimously²⁷ came to the important conclusion "that the remedy for the problem of marriage failure" does not lie "in making divorce more difficult." They went further and attempted a rudimentary sociological analysis of the causes,²⁸ mentioning such obvious factors as the housing shortage, the earlier age of marriage, the higher standard of living, the transformation in the social position of women, and the change in attitudes towards non-marital sexual relations. There is, rather surprisingly, no reference to the urbanisation of society or the "anonymity" of life in large towns, nor does the Commission appear to attribute importance to the disappearance in many respects of the family as an economic unit and the corresponding reduction in the pressure to maintain in being unhappy marriages. Instead,²⁹ it sees "the root of the problem" in a "tendency to take the duties and responsibilities

²⁷ No. 50.

²⁸ Nos. 43-49.

²⁹ No. 47; the main point is that the Commission bases the most momentous conclusions upon the statement quoted in the text. It became the foundation for the decisive Chapter II of Part I which deals with the "suggested new basis for divorce." At the beginning of this Chapter (No. 55) the Commission says that it has "considered whether to recommend any alteration of the grounds of divorce" "against the background of serious concern about the present attitude to divorce and its consequent high rate." Not only does the Commission at this point identify the divorce rate rather than the instability of marriage as the evil: it assumes the existence of a *causa* and assumes without evidence that it is the *causa efficiens* or *causa proxima*.

less seriously than formerly," in a resulting decrease of the "disposition to overcome difficulties and to put up with the rubs of daily life." All this may be quite true—but then it may not be true at all. Where is the evidence? The trouble is that statements of this kind are so easily influenced by emotional preconceptions instead of factual proof. Every lawyer knows how difficult it is to establish a causal nexus in cases of breach of contract or of tort. Why should this be forgotten when we are confronted with a social phenomenon instead of an individual case? Far more by way of social investigation would have been required than is reflected in the rather superficial discussion of the causes of marriage failure in the Report. One could have wished that a fraction of the care and respect for detail that went into the discussion of procedural technicalities had gone into the analysis of the social facts which were the raw material of the Commission's work. After reading the Report one does not feel greatly enlightened as to whether obstacles to divorce hold marriages together. Is not the rising divorce rate very largely a reflection of increasing social equality: what was yesterday the habit of the privileged few is today the right of the many?³⁰ How far, again, does the growing number of divorces indicate a more widespread inclination to prefer marriage to factual union? Is it not true that not so long ago masses of people never bothered to get married at all, and that consequently the dissolution of their unions did not appear in the divorce statistics? And does it perhaps indicate an enhanced rather than a diminished respect for marriage as an institution if people insist on having a marriage dissolved and on getting married again rather than having a mistress or a lover? These were the questions which, it is submitted, the Commission should have discussed, but they were not even touched upon in the Report. Still—superficial though it may be—the Commission's attempt at causal analysis indicates at least a recognition that the problem cannot simply be seen in terms of divorce legislation.

On the other hand, though the Commission saw that to make divorce more difficult would be no help at all, nine of its members, having assented to this unanimous conclusion, believed that if "divorce by consent" were introduced, "the divorce rate would be swollen by the failure of marriages which would otherwise have held together with advantage to both parties as well as to the children."³¹ Five members went so far as to oppose a majority recommendation tending to remedy those situations in which one has made life intolerable for the other and they have lived apart for three years, but for technical reasons there is no "desertion" on either side,³² i.e., they were determined to keep intact the

³⁰ See *per Langton J.* in *Germany v. Germany* [1938] P. 202 at 207.

³¹ No. 69 (ii).

³² No. 156. This is the problem of the "intention to drive away" as an ingredient of constructive desertion. See below.

empty shell of a marriage which has broken down beyond repair. And the Commission unanimously recommended that adultery should, in England, remain a discretionary bar, but not as such be introduced in Scotland, so as, in England, but not in Scotland, to promote "respect for the binding sanctity of marriage" by making it the duty of the court to dissolve the marriage where one spouse has committed adultery, but putting it in the court's discretion where they have both done so and the likelihood of complete marriage failure is correspondingly greater.³³ The fact is that at least some of the members of the Commission appear to have regarded "*quieta non movere*" as their watchword.³⁴ Hence, while, in refusing to make divorce more difficult, they emphasised how little the law could do to prevent marriage failures, they laid great stress on the law as a factor promoting respect for the binding sanctity of marriage when it came to considering proposals to make divorce easier.

Supposing, however, one assumes that the growing divorce rate is indicative of a deterioration in the stability of marriage, can one overlook the fact that the phenomenon is quite international, despite the differences in the divorce laws of the various countries? In England and Wales the total number of divorce decrees rose from 7,621 in 1938 to 27,353 in 1954,³⁵ and the Scottish figures show a similar increase,³⁶ but in the United States the divorce rate rose between 1888 and 1949 from 0.5 per thousand of the

³³ Nos. 228, 229. In *Blunt v. Blunt* [1943] A.C. 517 at 525, the leading case on the exercise of discretion in the event of the petitioner having committed adultery, Viscount Simon L.C. spoke of "the interest of the community at large, to be judged by maintaining a *true balance* between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down." The Commission quoted this without dissent (No. 225) and did not pause to consider how far this "public policy" was compatible with the doctrine of the matrimonial offence. It went on to justify the continued existence of adultery as a discretionary bar, saying (No. 228) that while "it *may be* contrary to public policy to maintain a marriage which has completely broken down, it is *necessary to give at least equal weight* to the other consideration, namely, the maintenance of 'respect for the binding sanctity of marriage.'" The words which have here been italicised show a very distinct shift of emphasis.

³⁴ It would be tedious to enumerate all the passages in which the Commission or in which members of the Commission rejected a proposal on the ground that it was "new." See, e.g., Nos. 147 and 150 where, in the law of desertion, certain changes were opposed, in one case by the entire Commission, in the other by a minority of five on the grounds that it would be "an entirely new concept of the matrimonial offence of desertion and one which certainly was not in the contemplation of Parliament in 1937" and, in the other case, "a new ground of divorce for desertion which would be quite different from the existing ground approved by Parliament in 1937." Whatever may have been the (perhaps dubious) merits of the particular proposals here rejected, it is a little surprising that a reform proposal should be rejected on the ground, *inter alia*, that it was not in the mind of Parliament almost twenty years ago.

³⁵ App. II, Table 2 (i), p. 359. These are the decrees *nisi*. The figure for 1955 is 26,093 (Cmd. 9775, p. 30).

³⁶ App. II, Table 3, p. 366.

population to 2.6, while at the same time the marriage rate rose from 8.8 to 10.7: in 1949 there was one divorce in about four marriages.³⁷ Compared with this the dimensions of the problem are still fairly modest in this country. The statistics in Appendix II of the Report³⁸ show that the divorce rates are still lower in England and Scotland than in France, Denmark, Sweden, Australia, or New Zealand. The swelling of the divorce rates itself appears to have more to do with what modern societies have in common than with what is peculiar to each of them, more, that is, with the economic and psychological environment of our modern industrial and highly mobile society than with the details of the law which vary so much from one country to another. In any event, if there is one thing that singles out this country from others it is that divorce has remained less frequent here than in other comparable communities. The Commission does not emphasise or even mention this point, nor the international nature of the phenomenon. How far the rate or quantum of the increase in the divorce rate (as distinguished from the mere fact of increase) is affected by the details of the law (as it may well be) is as open a question today as it was before the Commission started its work.

Whatever one may feel about the Recommendations of the Commission, it is regrettable that they do not rest on a fuller and more scientific analysis of the factual background. It is a pity that the legal profession has taken so little cognisance of the application of scientific methods to social phenomena.

FACTS OF LIFE AND FACTS IN COURT

For it is very much a "lawyer's report." Nor is this surprising in view of the Terms of Reference which were couched in highly legalistic language and which invited a procedural approach rather than an emphasis on social policies. How far can it be said that a Report which is so much stronger in its analysis of procedural machinery than in that of social facts has viewed this machinery in realistic terms?

It is a commonplace that wherever the law permits judicial divorce *a vinculo* there are three kinds of situations leading to divorce proceedings: (1) Both spouses wish to terminate the marriage and also agree upon the terms of the divorce, *viz.*, which should be the "guilty" party, what should be the fate of the children, and how maintenance and property questions should be regulated. (2) They agree that the marriage should be terminated, but cannot agree on the terms or on all the terms. (3) One spouse

³⁷ See the Statistical Table provided by the Federal Security Agency, Public Health Service, National Office of Vital Statistics, printed in Jacobs and Goebel, *Cases and Other Materials on Domestic Relations* (Foundation Press Inc.), 3rd ed. (1952), p. 385.

³⁸ See App. II, Table 5, p. 368.

wishes to terminate the marriage, but the other spouse wishes to keep the marriage tie intact, for whatever reasons it may be (and there may be many such reasons).

How many divorce proceedings originate in any of these three situations, we do not know. Here everything is conjecture. One may surmise that the only cases which belong to the third category are the comparatively small proportion of cases which are defended—and not nearly all of them, for in many of them there is a cross-prayer. This third category is not by any means uniform as regards the motives of the respondent. He (or she) may wish to oppose a divorce on religious grounds, or for fear that after a second marriage the husband may be unable or unwilling to support his former wife and her children, or perhaps for less creditable reasons such as pure spite. What one would very much like to know is whether there are any (and if so how many) cases in which a respondent, in defending a divorce petition, does not only aim at maintaining the *vinculum matrimonii* but at restoring the *consortium*. Have there been any follow-up investigations to show in how many cases of dismissed divorce petitions the marriage was restored in fact and not only upheld in name? The likelihood of spouses having faced each other in the divorce court coming together again does not seem to be intrinsically overwhelming. And if such a possibility exists, would they not have been almost as likely to marry again had the court made a decree? In short—from the point of view of repairing the marriage, how important, after all, is the outcome of divorce proceedings? Is it not the petition rather than the decree which marks the final step in the married life of the couple? The Commission seemed to recognise this when they made the excellent recommendation³⁹ that the court should have the power of regulating the custody of children after the dismissal of a petition.

It is probably a good guess that many, perhaps most, of those petitions which are defended, are litigated because the problem of guilt (who divorced whom?) happens to be of more than technical significance, e.g., because either spouse can for professional reasons not afford to have been divorced, or because there is a genuine fight for the children, for maintenance, or for a property settlement. Again, it may be suggested that the Commission itself took account of reality when it recommended that it should be made easier than it is now for an unsuccessful respondent to ask for a decree absolute.⁴⁰

It does not however seem to have made any attempt to elucidate the "legal facts," i.e., to answer the question how far

³⁹ No. 402.

⁴⁰ No. 959. He can now do so at any time after three months from the earliest date on which the successful petitioner could have applied for a decree nisi: the Commission recommends that three weeks should be substituted for three months. See also the Recommendations to redefine "collusion" (Nos. 234, 235) which show a similar realistic tendency.

the "grounds" and the "bars" so minutely discussed in the Report have real significance except in terms of procedural techniques. Perhaps a classification of divorce proceedings in terms of the three categories suggested above might have more to do with reality than that in terms of adultery, desertion, cruelty, etc. Nine members took the view "that the law of divorce as it at present exists is . . . weighted in favour of the least scrupulous, the least honourable and the least sensitive; and that nobody who is ready to provide a ground of divorce, who is careful to avoid any suggestion of connivance or collusion and who has a co-operative spouse, has any difficulty in securing a dissolution of the marriage,"⁴¹ and nothing that the other members wrote refuted this statement. The same nine members thought⁴² "that the time has come to recognise that matrimonial offences are in many cases merely symptomatic of the breakdown of marriage." Is it an exaggeration to say with an American sociologist that "there is but one cause of divorce, namely, the culmination of the process of marriage disintegration of which specific incidents, serious or trivial, are but the indices of its regressive trend," that the "specific or spasmodic acts or incidents" which are the legal "grounds" are very frequently symptoms at best, pretexts at the worst? Does it require great psychological acumen to see that "cases are rare indeed in which a single fact or event destroys a marriage?"⁴³

This is the background. Upon this set of facts the law, as we all know, superimposes a complicated set of norms. By a fiction, each divorce case is considered as a genuine litigation, not only about the terms of the divorce but also about the dissolution of the marriage itself. The law pretends that the first two of the three situations distinguished above do not exist. The common desire of the spouses to terminate the marriage must be presented as a litigation (defended or *ex parte*) about a "matrimonial offence," a complaint about some conduct on the part of the respondent which forces the petitioner to ask for a divorce which the respondent (if he defends the case) must show himself determined to resist. Nor is this by any means peculiar to English or to Scottish law: the difference being that perhaps the legal profession in this country is a little less cynical than elsewhere and more determined than lawyers on the Continent or in America to believe or to show a belief in the reality of the legal ideology. These observations are not unconnected with the Report of the Royal Commission. The discussion of the problems of fault or failure as a "ground" for divorce, of "specific grounds" or

⁴¹ No. 70 (v).

⁴² No. 70 (vii).

⁴³ *Divorce: A Sociological Interpretation*, by J. P. Lichtenberger, 1931. (McGraw-Hill Book Company Inc.) The relevant passages are quoted in Fowler V. Harper, *Problems of the Family*, 1952 (Bobbs-Merrill Co. Inc.) p. 652.

"general clause," and most importantly perhaps that of the link between the outcome of the proceedings (guilt and innocence) and the consequences of the divorce (maintenance, property, social insurance)⁴⁴ might have sounded more realistic, occasionally also perhaps a trifle less Olympic and censorious and more human and understanding, if the question of "grounds" for divorce had been seen in proper perspective.

Not that this clash between facts of life and facts in court could be entirely avoided. The only way of doing this would be to introduce divorce by consent pure and simple, *i.e.*, to treat marriage as an ordinary contract which the parties may modify or terminate by agreement. A strong case can be made for the unanimous view of the Commission that this would be undesirable,⁴⁵ even if one does not see any evidence that divorce by consent would have an adverse effect upon the stability of marriages or (a different thing) lead to more divorces or has done so where "incompatibility" is a ground for divorce which (as the Commission points out) is practically indistinguishable from divorce by consent.⁴⁶ The trouble with divorce by consent is however that it leaves the economically weaker spouse (often the wife) unprotected⁴⁷ against being coerced or blackmailed or bribed into submission,⁴⁸ and the extreme difficulty (to say the least) facing any court or Queen's Proctor or other authority in finding evidence of such machinations where they exist. More importantly however, divorce by consent would mean that the spouses would be at liberty to create a situation detrimental to the children, a risk which, as the Commission recognised, is also present in the existing law. Accordingly the Commission made the momentous and progressive recommendations "that in every divorce case the interest of the children" should be an issue before the court, such interest being "just as important as the question of divorce,"⁴⁹ that the High Court should in all matrimonial proceedings have the power to require the interests of the children to be represented,⁵⁰ that a welfare officer taken from the probation service should be attached to every court dealing with matrimonial cases,⁵¹ that no decree nisi

⁴⁴ Six members wanted to deprive a "guilty" spouse of any right to maintenance (No. 503). Only the "innocent" spouse is to be given any rights with regard to the matrimonial home or its contents after a divorce (Nos. 694, 697). The question of "guilt" is even to invade the law of social security: the suggested amendments to the National Insurance Acts in favour of a wife after a divorce are only to operate in favour of the "innocent" wife (No. 712).

⁴⁵ No. 60.

⁴⁶ No. 96.

⁴⁷ See on this No. 69 (xi).

⁴⁸ This is perhaps the only real, at any rate the most important function of "collusion" as a bar to divorce. See No. 234 and the suggestion for a statutory definition.

⁴⁹ No. 376.

⁵⁰ No. 927.

⁵¹ Nos. 389 *et seq.* (*i.e.*, not only in London, as now).

should be made absolute until the best possible arrangements have been made for the care and upbringing of any children under sixteen⁵² and that for the purpose of satisfying itself that this has been done the court should be able to ask the welfare officer for an investigation and report.⁵³ Clearly, as soon as the children's welfare becomes an "issue," the court or someone acting on its behalf (Queen's Proctor, welfare officer) must have a power and duty to "inquire," and for that reason alone the ordinary rules of the law of contract cannot be applied to marriage nor those of civil procedure to matrimonial causes: there are situations in which the court must be able to say "no" though both spouses want a divorce. In such situations spouses agreed upon a divorce will always tend to conceal from the court facts which they think might induce the court to refuse their request. Even so, the contrast between what happens and what is said in court need not be as glaring as it so frequently is in divorce cases, and the respect for the law need not suffer as much as it does.

If, as seems to be widely agreed, the court must, in matrimonial causes, have an investigative function entirely absent in ordinary civil cases,⁵⁴ it is at least worth inquiring whether the ordinary courts and the ordinary mechanism of litigation are suited for this purpose. That mechanism presupposes a true conflict of interests which very frequently does not exist in divorce cases. The court is supposed to fill the gap by doing what is always said to be fundamentally contrary to the common law notion of the judicial office, *viz.*, to combine the judicial with the inquisitorial function. Now the one thing no law and no court can do is to force a willingness to fight upon parties determined to agree—and this is not the only example. Where the parties are agreed in a manner deemed to be opposed to the public interest, that interest goes by default unless litigation gives way to inquiry and the judicial to the administrative officer, no matter whether the public interest is violated by a contract in restraint of trade or by a collusive divorce to the detriment of the children. This, it is suggested, and not the wickedness of the parties⁵⁵ accounts for the unreality of the law of collusion and of so much of divorce law in general. This, too, is the reason why the use of litigation for "matrimonial causes" is such a problematical thing (although even to question its usefulness arouses the wrath of many lawyers) and why those

⁵² No. 373.

⁵³ No. 374. This may possibly justify (although not mentioned in that context) the recommendation (No. 958) to extend from six weeks to three months the period between decree nisi and application for decree absolute. The Commission rejected a more far-reaching proposal that the court in its discretion should be able to refuse a decree where this would be in the children's interest (No. 219), and did not even consider the possibility that it might be an argument in favour of a divorce. Yet this possibility was clearly mentioned by Lord Simon in *Blunt v. Blunt*, *ubi supra*.

⁵⁴ See Matrimonial Causes Act, 1950, s. 4.

⁵⁵ See No. 69 (xi) and (xii).

passages of the Report which deal with "the court which should have jurisdiction over Matrimonial Causes"⁵⁶ are so profoundly disappointing.

One gets the impression that the idea of the "Family Court," which the Commission rejected,⁵⁷ was, in their minds, linked with that of an easier divorce. They expressed the view that the present judicial system might not be best adapted to the handling of divorce cases if there was a "radical change" in the substantive law, but that, under the present law, "high judicial qualities" were essential. This seems to imply that these qualities are only found in the High Court or Court of Session and are necessarily found there.⁵⁸ It ignores the fact that the present law requires (at any rate on its face) inquisitorial in addition to "judicial" qualities and that to make divorce easier means to make the proceedings more and not less "judicial." The point however is not to make divorce easier but to find a better method for the protection of the children, and in this context one regrets that the Commission rejected all proposals for changes in the constitution of the courts. Their only recommendation was to return as early as possible "to the system under which all cases, defended or undefended, are tried by judges of the High Court,"⁵⁹ although they realised that this could not be implemented at once.⁶⁰ This is the least satisfactory part of the Report, both for what it says and for what it leaves unsaid.

FAULT OR FAILURE?

To oppose divorce by consent pure and simple is not, of course, equivalent to accepting the doctrine of the "matrimonial offence." There are in fact two problems which it is advisable to distinguish. One is the problem of "fault or failure," *i.e.*, whether the law should dissolve a marriage only if in some sense its disintegration was due to the "guilt" of either spouse, or whether the objective fact of disintegration should suffice. The other problem is that of "general clause or enumeration of grounds," *i.e.*, whether the proof of specific defined sets of facts should be required and sufficient or whether the court must be satisfied as to the general deterioration of the marriage, each single event being only an incident serving as evidence. These two problems are quite different. Thus it is possible to affirm the "failure" principle *in toto* or in part, *i.e.*, to reject the doctrine of the "matrimonial

⁵⁶ Part XI.

⁵⁷ No. 747.

⁵⁸ Proposals to transfer jurisdiction in matrimonial causes to the county courts or to the magistrates' courts in England or to the sheriff courts in Scotland were rejected: Nos. 750, 752, 765. So was a proposal to transfer divorce jurisdiction to the Queen's Bench Division: No. 754. The division of opinion in the Scottish legal profession is particularly significant: No. 763.

⁵⁹ No. 758.

⁶⁰ No. 759.

offence" as the basis or the only basis of divorce and yet to argue in favour of a formulated ground or grounds of divorce which alone will enable the court to terminate the marriage. This the present law does in cases of insanity,⁶¹ and this was the essence of the Bill which Mrs. Eirene White, M.P., introduced in the House of Commons, but withdrew when the Government undertook to appoint the Royal Commission. It was to the effect that, in addition to the traditional matrimonial "offences," it should for either spouse be a ground for divorce that he or she had been separated from the other for seven years, that there was no reasonable prospect of reconciliation, and that suitable financial arrangements had been made for the protection of the wife.⁶² If this were accepted the law would still be based on the enumerative principle but it would embody the "failure" in addition to the "fault" idea.

On the other hand, one can cling to the "fault" principle, but like the (now repealed) provision of the German Civil Code,⁶³ formulate a "general clause," e.g., that the marriage will be dissolved if through the fault of either spouse or both spouses the marriage has disintegrated to such an extent that the spouses can no longer be expected to cohabit. It has been a pretty general experience that where legislation fails to provide a general clause of this kind, the courts will provide it. One (or two or more) of the formulated "matrimonial offences" (or even, as in the State of New York, a ground of "nullity") will, under the pressure of social facts, be "interpreted" by the courts until it comes at least close to being an equivalent of a "general fault" clause. This happened in France with "*excès, sévices ou injures graves*,"⁶⁴ in many of the states in the United States with "extreme," "intolerable" and other kinds of "cruelty,"⁶⁵ in New York with "fraud,"⁶⁶ and in England with "constructive desertion" and to

⁶¹ The Commission (including those of its members most firmly committed to the "guilt" principle) recommends improving the law governing unsoundness of mind as a ground of divorce and enlarging it so as to include mental deficiency. Nos. 186-209; 91-95. See further below.

⁶² See No. 63.

⁶³ S. 1568: this was in addition to other provisions dealing with "matrimonial offences" such as adultery and desertion, etc. The Swiss Civil Code (s. 142) provides that deterioration of the marriage is in itself a ground for divorce for either side if it has gone so deep that the spouses must not be expected to cohabit, but if the deterioration is predominantly due to the fault of either spouse, only the other can sue for a divorce. In addition there are other grounds, e.g., adultery, infamous crime, severe cruelty, desertion, incurable insanity, etc.

⁶⁴ Code Civil, Art. 231.

⁶⁵ See Keezer, *On the Law of Marriage and Divorce*, 3rd ed., 1946 (with Supplement, 1950) (Bobbs-Merrill) Chap. 21; Jacobs and Goebel, *ubi supra*, pp. 473 *et seq.* At p. 474 it is stated that, while in the five post-Civil War years cruelty was a ground in only 12.9 per cent. of the cases (all over the United States), this rose to 42.7 per cent. in 1932. "In 1949, the average for sixteen specified states was 66.09 per cent."

⁶⁶ Adultery is the only ground for divorce in New York. See Jacobs and Goebel, *ubi supra*, pp. 280 *et seq.*; Harper, *ubi supra*, pp. 205 *et seq.* There are

a smaller extent with "mental cruelty."⁶⁷ All this goes to show that social pressures and the responses they find in the courts matter at least as much as the legislative formulation of "grounds."

It follows that the two matters of central significance in the First Part of the Report are the treatment of Mrs. White's proposal and that of "constructive desertion." First, then, as to seven years' separation as a ground for divorce, which went to the root of the matter. The Commission was unanimous in rejecting divorce at the mere option of either spouse, even after seven years' separation and with the safeguards in Mrs. White's Bill,⁶⁸ but it split on the more important issue of the principle underlying the Bill, which was the "doctrine of breakdown of marriage." Nine members including the Chairman, Lord Morton of Henryton, opposed this doctrine in any form because they considered "that it would be gravely detrimental to the community."⁶⁹ They admitted that marriage failures are not normally due exclusively to the fault of either side and that there was "an element, of artificiality . . . in the doctrine of the matrimonial offence, and the consequential emphasis on legal guilt or innocence,"⁷⁰ but they did not say that the frustration of a marriage may be a misfortune for which neither spouse is to blame. On the contrary: they opposed the "belief that there was a wholly blameless way of terminating a marriage," and insisted that "it is not the function of the law to provide such a means of release; its proper function is to give relief where a wrong has been done."⁷¹ Except for the case of insanity as a ground of divorce, these nine members continue to look upon divorce as a kind of redress for an injury inflicted by one spouse upon the other, an attitude which, as the other members of the Commission suggest, "may appeal to legal minds accustomed to discourse in a world of legal rights and wrongs."⁷² They rejected marriage breakdown as a ground for divorce because they firmly believed that it was not a "triable issue"⁷³ and in practice indistinguishable from divorce by consent which they considered as "incompatible with the concept of marriage" as a union for life.⁷⁴ This objection also covered the proposal to make marriage dissoluble after seven years' separation unless either spouse objected: the additional fact of prolonged separation did not, in their view, make any difference.⁷⁵ They admitted that at present there are "some" arranged divorces and expressed "grave concern" at a situation in which "if two people are determined to get a divorce they may succeed, notwithstanding that the law expressly provides against this,"⁷⁶ but they were

said to be two annulments for three divorces in New York. Compare the role played by annulment for "precontract" and "affinity" in the pre-Tridentine Canon Law.

⁶⁷ See No. 69 (xxxviii).

⁶⁸ Nos. 62-64.

⁷¹ No. 69 (xii).

⁷⁴ No. 69 (vii).

⁶⁹ No. 66.

⁷² No. 70 (iii).

⁷⁵ No. 69 (xxv) *et seq.*

⁷⁰ No. 69 (xxxvi).

⁷³ No. 69 (xxxiv).

⁷⁶ No. 69 (x) *et seq.*

even more determined to uphold the scheme of "matrimonial offences" as a "clear and intelligible principle" which "makes for security in marriage because husbands and wives know that they cannot be divorced unless they have committed one of the matrimonial offences which is ground for divorce."⁷⁷ They saw in this an "external buttress" which strengthens the good and controls the bad impulses,⁷⁸ but which is nevertheless (as shown by the law of constructive desertion and mental cruelty) adaptable to changing views of society, leaves few cases of hardship and is approved by public opinion.⁷⁹ These were the principal reasons for which they rejected the doctrine of marriage failure in any shape or form. At the same time they assented to recommendations plainly incompatible with the principle of "guilt," such as the proposals that insanity should be no defence to a charge of cruelty⁸⁰ or desertion⁸¹ unless in the latter case the initial act of desertion was a manifestation of the respondent's abnormality. Moreover, much of the substance of the recommendations on marriage guidance and conciliation and of the language in which they are formulated and justified⁸² manifests a belief that the failure of a marriage is a misfortune rather than a guilty act, and that measures must be taken to prevent it. Nor did any member of the Commission contradict the view expressed in 1943 by the then Lord Chancellor that it is against public policy to insist on the maintenance of a union which has utterly broken down.⁸³

Nine other members, whilst agreeing "that the present law based on the doctrine of the matrimonial offence should be retained"⁸⁴ were in favour of introducing "to a limited extent" the doctrine of the breakdown of marriage"⁸⁵ and they pointed to specific situations in which a marriage may founder without anyone's fault.⁸⁶ They did not however recommend that either spouse should, after seven years' separation, have an unqualified right to a dissolution of the marriage, but proposed that, as against a petition based upon the ground of seven years' separation, the other spouse should be able to record his or her objection and thus prevent the dissolution of the marriage.⁸⁷ Four of these nine members, including Lord Keith of Avonholm, who had the support of the evidence of leading members of the British Medical Association and of the Law Society,⁸⁸ went further, and, following

⁷⁷ No. 69 (xxxvi).

⁷⁸ No. 69 (xxxvii).

⁷⁹ Nos. 259, 260. Where desertion consists in "conduct of a grave and weighty nature" forcing the other spouse to leave the matrimonial home (see below)

⁸⁰ No. 256.

⁸¹ No. 259, 260. Where desertion consists in "conduct of a grave and weighty nature" forcing the other spouse to leave the matrimonial home (see below) and in the analogous case of "intolerable conduct" in Scottish law, even insanity at the beginning of the period of desertion is not to be a defence (No. 261). This presupposes of course that the relevant majority recommendations are accepted.

⁸² Part IV, Nos. 327-365.

⁸³ *Supra* note 33.

⁸⁴ No. 65.

⁸⁵ No. 67.

⁸⁶ No. 70 (iv).

⁸⁷ No. 70 (viii).

⁸⁸ No. 71 (v).

to some extent the example of the law of New Zealand,⁸⁹ recommended that the objection should be overruled if the applicant satisfied the court that the separation was in part due to the unreasonable conduct of the objecting spouse.⁹⁰ The court would then have to scrutinise the reasonableness not of the objection, but—a very different thing—of the matrimonial behaviour of the spouses, and (in contrast with New Zealand) the objecting spouse would have the burden of proof. In both forms this proposal for “dissolution of marriage”⁹¹ would remedy the present sordid state of affairs in which a spouse has either to commit a “matrimonial offence” or to commit perjury if both spouses wish to terminate a marriage which has irretrievably collapsed.⁹² Equally important, it would “afford relief in cases where one spouse declines to divorce the other out of apathy.”⁹³ On the other hand, neither proposal forces the hand of a spouse who has “conscientious grounds against dissolution of marriage,” except (according to the proposal of the Four) where her or his matrimonial conduct was unreasonable, in which case “it would seem unjust to hold that conscientious scruples should prevail.”⁹⁴ Still—not even the proposal of the Four remedies the great hardship created where a spouse, without any conscientious grounds and out of pure malice, objects, there being no evidence of her or his unreasonable conduct before the separation. Should it not have been the reasonableness of the objection rather than the reasonableness of the conduct of the objector seven years before the objection that should have mattered? No member of the Commission favoured the idea that a spouse against whom a separation decree or order had been made (as distinguished from the one who had obtained the decree or order) should be able, after three years, to have it converted into a divorce,⁹⁵ but the nine members favouring the seven-year rule did not want the existence of a separation decree or order to be a bar to its application.⁹⁶

The nineteenth member of the Commission, Lord Walker, a judge of the Court of Session, proposed to abolish the doctrine of the matrimonial offence altogether,⁹⁷ but also rejected divorce

⁸⁹ No. 71 (vi) and (vii); see the article by Blom-Cooper, p. 638, *post*.

⁹⁰ No. 71 (i).

⁹¹ This term rather than “divorce” was to be used for proceedings based on breakdown or frustration of marriage under the seven-year-rule or by reason of insanity, to distinguish them from divorce proceedings based on a matrimonial offence, in view of “all the implications of intention and culpability” which the word “divorce” connotes. No. 70 (xiii). Some might regard this discriminatory terminology (for which there is a precedent in Matrimonial Causes Act, 1950, s. 16) as not very desirable, but the point is unimportant.

⁹² No. 70 (ix).

⁹³ No. 70 (x).

⁹⁴ No. 71 (ii).

⁹⁵ Nos. 310–312.

⁹⁶ No. 312.

⁹⁷ See the Statement, pp. 340–341.

by consent. He recommended that "dissolution on breakdown" should be "the sole mode of ending the marriage tie," and this "at the option of either party." "When the prospect of continuing cohabitation has ceased, the true view as to the significance of marriage seems to require that the legal tie should be dissolved." A marriage should be indissoluble, unless, after at least three years' separation, either party shows that "the facts and circumstances affecting the lives of the parties adversely to one another are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation." Lord Walker was thus a tenth member in favour of divorce by reason of frustration of marriage. Nevertheless,⁹⁸ he considered that, failing the adoption of his own proposal, the doctrine of the matrimonial offence should be retained and dissolution of marriage after seven years' separation be rejected. He did not apparently regard seven years' separation as sufficient evidence of a breakdown in the sense defined by him.

This however was the essence of the seven-year proposal: that mere consent was not enough and that strong objective evidence was required of the irretrievable collapse of the marriage. At the same time it was an attempt to avoid the alleged uncertainties of a "general clause" by substituting for "failure of marriage" an easily ascertainable fact, seven years' separation, which is an almost conclusive indication of complete frustration of marriage. The proposal had the merit of being cautious (perhaps too much so, as regards both the length of the period and the power of the other spouse to object) and yet conducive to remedying the scandalous situations created by the doctrine of the matrimonial offence and well described by those favouring the recommendation.⁹⁹ They rightly said that it would heighten "the respect for true marriage" by placing the emphasis on marriage as a real union for life.¹⁰⁰ Even so, after the division of opinion in the Commission on the fundamental issue, Parliament is perhaps not very likely soon to act in the direction of divorce law reform.

✓ In these circumstances insanity will for some time remain the only case of divorce on the ground that "the continuance of a normal married life has clearly become impossible," because even the most ardent advocates of the "guilt" principle regard this now "as a very exceptional case" "to which special considerations apply."¹ The Commission made the major reform proposal that "care and treatment in any hospital or other institution in England, Scotland, Northern Ireland, the Isle of Man or the Channel Islands, which is provided or approved by the appropriate authority for the treatment of mental illness, should be deemed to be care and treatment for the purpose of divorce proceedings on the ground of insanity in England and in Scotland."² Certification would thus

⁹⁸ No. 1204 (4), p. 310; p. 328.

¹⁰⁰ No. 70 (ix).

² No. 192.

⁹⁹ No. 71 (iii), (iv).

¹ No. 176, No. 56.

no longer be necessary—which is in line with the general policy of the law to encourage voluntary treatment.³ Moreover, treatment outside the Mental Treatment Act, *e.g.*, in the psychiatric ward of a general hospital, would count,⁴ and the position of the “temporary patient” be clarified.⁵ There was no recommendation to shorten the five-year period but there were some useful minor proposals to make the requirement of continuity less stringent,⁶ to include treatment abroad,⁷ and to assimilate in some respects Scottish to English law.⁸ Finally, a spouse married to a mental defective is to have rights of divorce similar to those now given to a spouse married to a person of unsound mind, provided the mental defective has, by reason of his or her dangerous or violent propensities, been detained in an institution for a continuous period of at least five years immediately preceding the petition, and his or her recovery is highly improbable. The Commission itself found on the basis of its inquiries that this recommendation would be of very limited importance in practice.⁹

TOWARDS A GENERAL CLAUSE?

On the assumption that the “fault” principle will remain a basis or the exclusive basis of divorce law, the Commission had to answer the further question whether the specific “matrimonial offences” should remain grounds of divorce *per se* or be only evidence that the offending spouse destroyed the marriage, and the different but kindred question whether anything like a “general clause” should emerge.

The Commission was clearly in favour of retaining the “matrimonial offences” as such: it unanimously recommended not to make a change in the present law by which a single act of adultery is a ground for divorce and rejected proposals to replace this by divorce on proof of “adulterous association” or of “repeated acts of adultery” or to give the court a discretion.¹⁰ What in the context of adultery as a bar is called “the extent of the adultery”¹¹ is to remain irrelevant for adultery as a ground for divorce, and it is to be left to the injured spouse whether to

³ No. 177; No. 190.

⁴ No. 177; No. 191.

⁵ No. 194.

⁶ Continuity of in-patient treatment not to be regarded as interrupted by absence as long as patient's name remains on the current records of the hospital (No. 200), and no break in treatment through discharge or self-discharge to count as interruption unless exceeding 28 days (No. 201).

⁷ No. 209: The petitioner or pursuer would have to satisfy the court that the standards of treatment in the foreign country are the same as those in England or Scotland.

⁸ Nos. 204, 208. The main point is that in Scotland incurability and five years' in-patient treatment would have to be proved as independent requirements (as in England) and the latter would cease to be evidence of the former.

⁹ Nos. 91-95.

¹⁰ Nos. 115-119.

¹¹ No. 227.

forgive a single act of adultery or to found divorce proceedings on such conduct.¹² This implies clearly enough that in many cases the adultery is not the cause but only the occasion for the proceedings, and even that it may be to a decreasing extent.¹³ An innovation recommended by the Commission may be mentioned in this context: Acceptance by a wife of artificial insemination by a donor without the husband's consent is to be made a new and separate ground for divorce.¹⁴

As regards the main question, that of the "general clause," the courts have under the present law (as mentioned above) had to go a long way towards interpreting "desertion" and "cruelty" so as to make them in fact under-cover substitutes for a general clause envisaging culpable destruction of the marriage. The extent to which English law (differing here from Scottish law) has given effect to this policy of considering the married life of the parties as a whole rather than isolated incidents, can best be summed up in the Commission's own words¹⁵:

"Conduct by one spouse of a grave and weighty nature which makes married life unbearable for the other spouse may at the present time be pleaded before the court in one of three ways. If such conduct is accompanied by injury to health and the court is satisfied that it is 'aimed at' the other spouse and that he needs protection, it will constitute legal cruelty, for which the remedy of divorce is immediately available. If one or more of the requirements of legal cruelty are lacking, but nevertheless there was present an intention, actual or presumed, on the part of one spouse to bring married life to an end and to drive the other spouse from the home, the conduct will amount to constructive desertion, which, if persisted in for three years or more, will also give a right to divorce. If, however, the court is unable to find that the element of intention to expel is present, such conduct may yet be held to be ample justification for one spouse leaving the other and will therefore be a sufficient answer to a petition by the other spouse for restitution of conjugal rights or for divorce on the ground of desertion."

I.e., unless the "unbearable conduct" has the aggravating features of "cruelty" the spouses have to wait for three years, and even

¹² No. 119.

¹³ See App. II, Table 2 (i), p. 359. While in England and Wales until 1948 inclusive the majority of divorce decrees were given on the ground of adultery, only a little more than 40 per cent. of the decrees have been based on that ground since 1949. The delay in the effect of the 1937 Act may have been partly due to war and post-war conditions (and to some extent probably was), but one is left to wonder whether the decline in the percentage of petitions based on adultery is due more to an improvement in the standard of matrimonial fidelity or to a growing disinclination to use this ground of divorce and a corresponding growing preference for the use of desertion as a basis for a petition in circumstances in which adultery might have been used just as well. Are people getting more averse to airing their more intimate matrimonial affairs in public?

¹⁴ No. 90.

¹⁵ No. 153.

then there will be no divorce unless in addition to making life unbearable for the other spouse the guilty one intended to drive him out. If not, the unbearable conduct merely produces deadlock: neither can get a divorce: the *vinculum* remains though married life is over. This was the point which led to one of the most important dissensions in the Commission.¹⁶

Technically, it is the question of the scope of "constructive desertion."¹⁷ Where marriage reaches the point of destruction, cohabitation will of course cease. In order to have the marriage tie dissolved, there must be "guilt." The question is: is it relevant whether either of them was guilty in making cohabitation intolerable to the other or whether he was guilty in causing the separation? If the one who destroyed the marriage brings cohabitation to an end, this does not matter: it will be desertion, actual if he left, constructive if he deliberately caused the other one to leave. There are two critical situations: (1) One spouse by his "unbearable" conduct (short of cruelty) makes further cohabitation impossible, thus induces the other spouse to agree to a separation, and then leaves the home: here the present law provides no help and neither do the recommendations of the Commission (apart from the seven-year clause): the one who destroyed the marriage was not "guilty" of breaking up the home by a unilateral act. (2) One spouse (without having committed cruelty) has been responsible for the collapse of the marriage and the other one has left the home, there being no evidence that the one who remained intended to drive the other one out or even evidence that he or she did not wish the other spouse to leave. Here again the issue is whether the crucial point is the guilty act of causing the separation or the guilty conduct which induces the other spouse to leave. Theoretically it is the former, and hence this is not "constructive desertion." This is the decisive point.

In this (second) situation the courts have helped by saying that, in the absence of intention either way, the spouse who makes life intolerable for the other must be presumed to have willed the consequences and to have intended to drive the other one out. So far, so good. But is the presumption rebuttable?¹⁸

¹⁶ Nos. 155, 156; Nos. 170, 171.

¹⁷ It is not easy to gauge the practical importance of the problem because the statistics do not distinguish between "actual" and "constructive" desertion. Desertion looks like becoming the most important ground for divorce in England and Wales (see App. II, Table 2 (i), p. 359) and it certainly is in Scotland (*ibid.*, Table 3, p. 366). From 1950 to 1953 the number of divorce decrees by reason of desertion exceeded in England and Wales that of decrees on any other single ground, and in 1954 and 1955 it almost reached the number of those based on adultery (See Cmd. 9775, Table 11 (B) (ii), p. 28). In each year since 1949 well over 40 per cent. and in some years almost 50 per cent. of all decrees were granted on the ground of desertion. In Scotland the corresponding proportion has been consistently over 50 per cent. since 1949. Desertion has of course been a ground for divorce in Scotland since the sixteenth century.

¹⁸ See No. 154.

What about a case like *Lang v. Lang*,¹⁹ where there was proof positive that the last thing in the world the sadistic husband desired was that his wife should quit?²⁰ In that case Lord Porter found a formula which can perhaps bridge the gap in very many cases, a subtle formula²¹ based on the distinction between the "intention to disrupt the home" manifested by actions known to have the probable result that the other spouse would leave and the ineffective and irrelevant "desire" that the result would not follow. Even so, the conflict continues; it continues in the English cases and it was present in the Commission which split on this very issue whether the presumption should be rebuttable. It will be appreciated that it was far more than a difference about the nature of a presumption: to make it irrebuttable means in effect to make intolerable conduct followed by three years' separation a ground for divorce and comes very close to introducing the "general clause."²²

Fourteen members of the Commission pointed out²³ that Lord Porter's formula merely "limited the circumstances in which the presumption can be rebutted" while "relief should be available whenever conduct on the part of one spouse of a grave and weighty nature has compelled the other spouse to break off cohabitation." Consequently they recommended that "proof of a conduct of a grave and weighty nature which is such that a spouse could not reasonably be expected to continue with the conjugal life" should "raise an irrebuttable presumption that the other spouse intended to bring married life to an end," and they devised a new definition of desertion avoiding the word "constructive" which they disliked. Although the Commission was unanimous in the view²⁴ that in practice this would only "slightly" increase the chance of obtaining a divorce by reason of desertion, five members dissented²⁵ on the ground that the removal of the need for proving the intention to drive out the other spouse would destroy a safeguard against the granting of a divorce by reason of incompatibility of temperament.

¹⁹ [1955] A.C. 402 (P.C.).

²⁰ Cruelty is no ground for divorce under the law of the State of Victoria where the case arose.

²¹ At pp. 428-429.

²² This becomes even clearer if one looks at the analogous situation in Scotland where the doctrine of constructive desertion has not been adopted (see No. 169) and where therefore the analogous recommendation (No. 170) could not take the form of making an existing presumption of an intention to drive out irrebuttable. There it had to take the form of a new ground for divorce (intolerable conduct followed by three years separation otherwise than by agreement) and unconnected with "desertion." The dissent of five members was (No. 171) in this case partly based on the absence of a wide general desire to make the change and on a "strongly held minority opinion in the legal profession that no alteration in the present law was necessary or desirable." It sounds as if not only the legal profession as such but even a minority of lawyers could veto reform.

²³ No. 155.

²⁴ No. 169.

²⁵ No. 156.

Much of the remaining discussion of the grounds for divorce must be read in the light of this proposal. This is particularly true of "cruelty" where the Commission refused²⁶ to recommend any change except so as to abolish²⁷ the need for proving that protection for the future is necessary. "Proof of past cruelty should in itself confer a right to divorce."²⁸ No change was recommended regarding either the need for proving injury or threatened injury to health²⁹ or that for proving conduct directed at the other spouse or intention to inflict injury (or awareness of its likelihood).³⁰ The Commission thus refused to make "intolerable conduct" as such, not followed by three years' separation, a ground for divorce,³¹ while at the same time stressing the need for keeping this ground for divorce flexible.³² In so far as the Commission can be said to have been favourably disposed towards the policy of the "general clause" it wished to see it implemented through the law of desertion and not through the law of cruelty.

The attitude of the majority towards the reform of the law of constructive desertion and to the flexibility of the law of cruelty partly explains the rejection by the Commission of new grounds of divorce, except for the technical change of converting refusal to consummate from a ground of voidability into a ground of divorce³³ and, as mentioned, to make artificial insemination a ground in certain cases,³⁴ and to extend divorce by reason of insanity to mental deficiency.³⁵ Thus, while "habitual drunkenness" is to remain a ground in Scotland, its introduction in England is not recommended,³⁶ though it is to be less stringently defined as a ground for a magistrates' order.³⁷ "Incompatibility of temperament" was rejected as in practice indistinguishable from consent and also by those in favour of the seven-year rule as covered by it.³⁸ So were "wilful and persistent refusal of sexual intercourse" and "wilful refusal to have a child" (both of which may amount to cruelty),³⁹ lesbianism⁴⁰ and also "cruelty to a child of either spouse" and the "commission of a sexual offence" against such a child,⁴¹ but the latter was recommended as an additional ground for a magistrates' order.⁴² The Commission turned down the idea that imprisonment for a long term or repeated imprisonment or preventive detention should *per se* be ground for divorce,⁴³ rightly, it is submitted, because the matter can be dealt with as "intolerable conduct" where necessary and there is something repulsive in making imprisonment a ground for divorce.⁴⁴

²⁶ No. 129.

²⁷ No. 132. This change is not to apply to separation petitions: No. 314.

²⁸ See 68 L.Q.R. 291; 16 M.L.R. 68, 72.

²⁹ No. 122.

³⁰ Nos. 123, 124.

³¹ See No. 134.

³² No. 133.

³³ Nos. 88, 89.

³⁴ No. 90.

³⁵ Nos. 91-95.

³⁶ No. 135.

³⁷ No. 1028.

³⁸ No. 96.

³⁹ Nos. 76-81.

⁴⁰ Nos. 86, 87.

⁴¹ Nos. 82-85.

⁴² No. 1029.

⁴³ Nos. 97-103.

⁴⁴ Or conviction and sentence, as in the large majority of the American states: see Keezer, *ubi supra*, Nos. 345-351.

The grounds on which the Commission rejected the proposal that a spouse should be able to divorce the other if he had committed murder and a death sentence has not been imposed or carried out⁴⁵ also carry conviction. All that is required can be done through a sensible interpretation of "cruelty." This is a good illustration showing how hopeless it is to try to solve the divorce problem through a catalogue of specific "grounds." When all is said and done, the spirit in which the laws are applied by the courts is more important than any form of words.

SOME PARTICULAR PROBLEMS

Although this article is not intended as a survey of all the recommendations made in connection with divorce and other matrimonial causes, it is appropriate to conclude by mentioning a few matters not so far discussed.

There was a division of opinion about the need for "continuity" of the period of desertion and the closely related problem connected with "condonation" of adultery or cruelty. It was felt that the insistence on the continuity of desertion and the strictness of the law of condonation deterred spouses from attempting a reconciliation.⁴⁶ One proposal which was rejected was that desertion over an aggregate of three years within the five years preceding the petition should suffice, provided it had lasted continuously for a year prior to the petition and still continued at that time.⁴⁷ Another proposal was that resumption of cohabitation should not interrupt desertion unless the court found as a fact that it amounted to reconciliation, but the Commission thought it was hard to imagine a situation where this was not the case.⁴⁸ Fourteen members, however, did not want a conditional reconciliation⁴⁹ to be quite impossible and accepted a proposal "that two periods of desertion which together amount to at least three years, within a period of three years and one month immediately before the commencement of the proceedings, should constitute a ground of divorce" so that the spouses would have one chance to "try

⁴⁵ Nos. 104-110. Convincing arguments are derived from the artificiality of the distinction between unfitness to plead and being "guilty but insane" (see No. 109, No. 110), and, although emphasised by the Commission only in connection with Scotland (No. 111), the thinness of the line which separates "murder" from "manslaughter" or "culpable homicide." More important than all this however is what the Commission has to say about the difference between one case of murder and another and about experience having shown "that murderers are not by any means incapable of reformation." No. 108 might be of some interest in the debate about capital punishment.

⁴⁶ See Nos. 142-145; No. 168; No. 238.

⁴⁷ Nos. 146, 147.

⁴⁸ No. 148.

⁴⁹ In a different but not entirely dissimilar context the courts have recognised the need for giving opportunities for "conditional reconciliation": see *Meyrick v. Meyrick* [1921] 1 Ch. 311 at 319 *et seq.* (Validity of a separation agreement *de futuro*.)

again" provided they made up their minds within one month.⁵⁰ Five members opposed it on the ground that it was "new,"⁵¹ but also on the more convincing ground that there would be no "climate of reconciliation" within the one month's time limit.⁵² The same fourteen members also supported an analogous recommendation that, in cases of adultery and cruelty, the spouses should have a trial period up to a month to attempt a reconciliation and that "nothing which ensues during that period should be regarded as amounting to condonation."⁵³ Both proposals for trial periods were linked with those made unanimously⁵⁴ for improved facilities for reconciliation which "cannot thrive in the atmosphere of a solicitor's office or over the table in a restaurant."⁵⁵

Other (unanimous) recommendations on "bars" to divorce were that an act or acts of sexual intercourse should raise only a rebuttable presumption of condonation, irrespective of whether husband or wife was the injured party,⁵⁶ and that "collusion" should be defined so as to restrict it to cases of conspiracy to put forward a false case or to withhold a just defence and to cases of divorce proceedings prompted by bribery or blackmail.⁵⁷ "Reasonable arrangements . . . before the hearing of the suit, about financial provisions for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to children, and costs" are to be protected.⁵⁸ The petitioner would have to bring such arrangements to the notice of the court, and the parties could raise the question of "reasonableness."⁵⁹ All this is linked with the recommendations on the validity of maintenance agreements and the power of the court to cancel or vary their terms, *i.e.*, on the clarification of the difficult issues raised by cases such as *Bennett v. Bennett*.⁶⁰

The Commission did not find anything immoral or repulsive in the assessment of the monetary value of a spouse by a court,⁶¹

⁵⁰ No. 149; No. 168. The wording of the recommendation goes further than apparently intended: as it stands it permits several attempts provided the various periods of cohabitation do not amount to more than one month in the aggregate.

⁵¹ No. 150 (i).

⁵² No. 150 (iii): "The growth of a true reconciliation is often delicate and precarious; it requires spontaneity and the absence of compulsion."

⁵³ No. 242; No. 246 (Scotland where it would also apply to the new ground of "intolerable conduct"): for the views of the five dissenting members see No. 243.

⁵⁴ Part IV, see esp. No. 340.

⁵⁵ No. 242 (i).

⁵⁶ No. 241, No. 245.

⁵⁷ No. 234. Scotland appears to have a much better law on collusion and not to require such a definition: No. 236.

⁵⁸ No. 235.

⁵⁹ In the course of the proceedings, or even before the presentation of the petition, *i.e.*, by summons or originating summons. The decision of the court on the "reasonableness" of the arrangements for children would not however tie its hands when deciding about suitable arrangements for their welfare to be made before a decree absolute. No. 373. *Supra*, pp. 583-584.

⁶⁰ [1952] 1 K.B. 249; see Nos. 727-730.

⁶¹ Nos. 432, 433.

and recommended that the right to damages against an adulterer should continue to be available in England and Scotland,⁶² in divorce and separation proceedings and independently,⁶³ but that it should also be made available to a wife against an adulteress.⁶⁴ They further proposed—and this is most important—that in respect of liability for costs in matrimonial proceedings the spouses should be on the same footing.⁶⁵ Accordingly the wife's costs should no longer be common law "necessaries" recoverable against the husband,⁶⁶ the English practice of an order for security for costs against the husband should be abolished,⁶⁷ and generally speaking a successful husband should not be liable for his wife's costs nor be compelled to prove her means before getting against her an order for his own costs.⁶⁸

On the substantive law of the validity of marriages the main recommendation, made against three dissents, was that, both in England and in Scotland, a man or woman whose marriage had been dissolved should be free "to marry during the lifetime of his or her spouse any person whom he or she could lawfully marry at the present time if that former spouse were dead."⁶⁹ This had been opposed by the Church of England and also by witnesses appointed on behalf of the Church of Scotland, and the Free Churches had expressed doubts.⁷⁰ The overwhelming majority of the Commission did not believe that an attachment between a man and his sister-in-law or a woman and her brother-in-law was less likely to develop as a result of a marriage prohibition (which had been the only intelligible argument against the reform).⁷¹

The Commission wisely rejected proposals to introduce into English law a kind of annulment for fraud ("wilful concealment of material facts" or of "grave diseases or abnormalities") or—a more debatable point—on the ground that, unknown to the other spouse at the time of the marriage, one had been rendered sterile by medical or surgical treatment,⁷² but they did not discuss the law of mistake or duress, *e.g.*, whether it is right that these grounds should make a marriage void rather than voidable. Nor did they touch upon the effect of non-age which, it is submitted, ought to make a marriage voidable at the option of the minor or his or her parents, and only until a reasonable time after

⁶² Nos. 432, 436.

⁶³ No. 435.

⁶⁴ Nos. 434, 436.

⁶⁵ No. 458.

⁶⁶ No. 459 (a).

⁶⁷ No. 459 (b).

⁶⁸ No. 460. There was a further recommendation (No. 462) that the award of costs against an adulterer should no longer depend on proof that the co-respondent knew the respondent to be married, but the presumption should be the other way, and the same *mutatis mutandis* in the case of an adulteress.

⁶⁹ No. 1169.

⁷⁰ No. 1161.

⁷¹ No. 1167.

⁷² Nos. 268–272.

reaching majority, and not permanently void. There is a general question whether any person should continue to be able in any proceedings and after the death of both spouses to allege the invalidity of a void marriage, but this was not mentioned. The Commission did however make proposals for the clarification of the relation between the common law voidness of a marriage by reason of insanity and the statutory voidability on this ground,⁷³ and the meaning of mental deficiency for purposes of voidability.⁷⁴

None of these matters are very important in practice. The statistics show that the law of nullity is of little actual significance, with the exception of voidability by reason of impotence or wilful refusal.⁷⁵ The latter, as already mentioned, is to become a ground for divorce,⁷⁶ and another recommended change is that artificial insemination of the wife with the husband's consent, either with his seed or with that of a donor, is to be a bar to a nullity petition by reason of impotence.⁷⁷ The court is also to be given a discretionary power to waive the one-year limit in certain cases of voidability.⁷⁸

The Commission did not recommend that the children of void marriages should, like those of voidable marriages, be *ipso facto* legitimate, but it proposed to extend the Scots law of the "putative marriage" to England, thus bringing English law into line with many other Western legal systems, *i.e.*, it recommended that the child of a void marriage should be legitimate if one parent was or both parents were ignorant of the impediment at the time of the marriage.⁷⁹ This would further reduce the practical importance of the distinction between "void" and "voidable" marriages, although under the recommendations of the Commission it would continue to be a dominant factor in the conflict of laws.⁸⁰

Although the Commission did not suggest that judicial separation should be abolished altogether,⁸¹ they proposed that it should

⁷³ No. 275. The Marriage of Lunatics Act, 1811, implicitly referred to in the analysis of the existing law (No. 265 (e)) and in the explanations in No. 274, though not expressly mentioned, does not seem to have been taken care of in the operative No. 275 which contains the recommendation. Surely the statute should be repealed.

⁷⁴ No. 278.

⁷⁵ See App. II, Table 2 (ii), p. 361: Out of 577 nullity decrees granted in England and Wales in 1954, 507 were granted by reason of impotence or refusal, only seventy for other reasons, fifty of these marriages were void, twenty voidable under s. 8 of the 1950 Act on grounds other than refusal. (This assumes that "insanity" in the statistics means insanity under the Act, not at common law, which would be covered by "lack of consent.") For the similar figures for 1955 see Cmd. 9775, p. 80.

⁷⁶ Nos. 88, 89, 283.

⁷⁷ No. 287.

⁷⁸ No. 285.

⁷⁹ No. 1186.

⁸⁰ Nos. 881 *et seq.* It would also, of course, remain important in other fields, *e.g.*, the law of evidence: *R. v. Algar* [1954] 1 Q.B. 279.

⁸¹ No. 303. This perpetuates the existence side by side of the magisterial separation order and the judicial separation decree which under the present law have, according to s. 5 (a) of the Summary Jurisdiction (Married Women)

only be granted by reason of adultery, cruelty and certain sexual offences, and no longer for insanity, desertion, or refusal to comply with a restitution decree.⁸²

From this brief analysis of some of the recommendations it should be clear that the Commission went with great care into the particulars of matrimonial law. But no amount of attention to detail can make up for lack of vision and for the absence of a well-considered policy based on a real knowledge of the facts. One can only hope that this disappointing document may not prove to be the epitaph of divorce law reform.

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Act, 1895, the same effect "in all respects." It is however true that, regrettably, under the recommendations of the Commission on property (No. 657) a decree would, for the first time, have important consequences which would not attach to a separation order. It is not easy to see the case for retaining the separation decree. The separation order should be sufficient. See however No. 308.

⁸² Nos. 313-316. The remedies available for "restitution of conjugal rights" and on "jactitation of marriage," though largely obsolete, are to be retained. No. 324, No. 326. One is tempted to argue that the latter should be abolished, and that it as well as the nullity decree (in the case of void, not of voidable marriages) should be replaced by judgments declaring that a valid marriage exists or does not exist, or no longer exists. See *Har-Shefi v. Har-Shefi* [1953] P. 161.

* Professor of Law in the University of London.

THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE: FAMILY DEPENDANTS AND THEIR MAINTENANCE

IN contrast with those parts of the Report of the Royal Commission on Marriage and Divorce¹ discussed elsewhere in this issue,² it is proposed here to consider the Commission's recommendations on two subjects on which there is generally little controversy, either in the Commission or outside it. These are, the law relating to children, and maintenance and aliment.³ If the discussion seems pedestrian, some small part of the reason may be that, on most aspects of these questions, all passion is long spent. Indeed, notwithstanding warnings in the Report on the fate of previous recommendations for the reform of family law,⁴ in this field even Ministers might be agreeable to the point of activity; legislation could be a possibility,^{4a} and it may be hoped that, whatever the shortcomings of the Report as a whole, its positive recommendations in these questions will soon be brought into effect. In this branch of the law it is particularly important not to throw the baby out with the bath water.

THE EFFECTS OF MATRIMONIAL LITIGATION ON CHILDREN

Perhaps nothing about our marriage laws would more greatly astonish that fashionable hero, the visitor from another planet, than the fact that in all the law concerning matrimonial litigation in England and Scotland, there is only one minor reference⁵ to the interests of the children. Having grasped this fact, he might be steeled for the discovery that English lawyers group orders for custody of children in matrimonial causes under the grotesque description of "ancillary relief," and the courts not infrequently deal with them accordingly. Custody orders all too frequently follow the cause, without even the most perfunctory inquiry as to the suitability of the successful party to control the destiny

¹ Cmd. 9568, H.M.S.O. 1956 price 11s. 6d.

² See O. Kahn-Freund, p. 573, *ante*.

³ The desirability of considering questions of maintenance and matrimonial property as a whole is manifest. Unfortunately the considerable controversy still raging over matrimonial property and shortage of space necessitate the separate consideration here of maintenance and aliment.

⁴ Including those of the Gorell Commission, which reported in 1912, Cmd. 6478; see paras. 22-26 of the present Report.

^{4a} See note 40 *post*, p. 622.

⁵ By the Matrimonial Causes Act, 1950, s. 2 (2), the judge shall have regard to the interests of any children of the marriage in determining applications for leave to petition for divorce within three years of the marriage.

of children.⁶ The Royal Commission now makes the uncompromising statement, none the less welcome for being half a century overdue, that the custody of the children should be recognised as just as important as the question of divorce,⁷ and on this assumption makes some of its potentially most important recommendations. The Commission itself, however, has surely adopted an unnecessarily restricted interpretation of its terms of reference⁸ in assuming⁹ that they exclude consideration of the Guardianship of Infants Acts in England, and applications for custody by petition to the Inner House of the Court of Session under the *nobile officium* in Scotland. Although, as a result, the recommendations made extend only to custody orders made in the course of matrimonial proceedings, it is to be hoped that to avoid unnecessary distortions in the law their operation will be extended also to these other applications.¹⁰

The Commission recommends¹¹ that the petitioner or pursuer in every petition for divorce, nullity, or judicial separation¹² and, if custody is contested, the respondent or defender also, should submit to the court a detailed written statement of proposed future arrangements for the care and upbringing of the children. There should be provision for investigation and report by a court welfare officer¹³ in such cases as the court may direct, and a

⁶ The Denning Committee (Cmd. 7024, para. 31 (iii)) quoted Rayden on *Divorce* at p. 346 to the effect that: "Custody of children is usually, except for grave cause, given to the innocent party." For the results see, e.g., Minutes of Evidence before the Royal Commission, 3rd Day, May 22, 1952, Paper No. 9, memorandum submitted by the National Society for the Prevention of Cruelty to Children, para. 730, p. 78.

⁷ Para. 376, p. 106. The Denning Committee went rather further in saying (Cmd. 7024, para. 33): "It should be recognised that parents who have been, or are about to be, divorced have no absolute right to determine the future of their children. They have disabled themselves from fulfilling their joint responsibility and have created a new situation in which the interests of the children need consideration apart from those of the parents."

⁸ "To inquire into the law of England and the law of Scotland concerning divorce and other matrimonial causes and into the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife, and to consider whether any changes should be made in the law or its administration, including the law relating to the property rights of husband and wife, both during the marriage and after its termination (except by death), having in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children . . ." (italics supplied).

⁹ Para. 364, p. 103.

¹⁰ See particularly the Guardianship of Infants Act, 1886, s. 5. The statement, twice made in the Report (paras. 363, p. 103 and 407, p. 114) that under the Guardianship of Infants Act, 1925, s. 1, "in any proceedings before any court where the custody or upbringing of a child is in question the court, in deciding that question, must regard the welfare of the child as the first and paramount consideration," is correct as far as proceedings between the parents are concerned, but it is not invariably applied in other cases, see, e.g., *Re Carroll* [1931] 1 K.B. 317, and particularly Slessor L.J. at p. 355 (custody of an illegitimate child). The principle was, however, applied in *Re Collins* [1950] Ch. 498 (which concerned a legitimate orphaned child).

¹¹ Paras. 374, p. 106 and 414, p. 116.

¹² Separation in Scotland.

¹³ The Commission finds that the Court Welfare Service, inaugurated in London in 1950 as a result of the Denning Committee Report, has been a valuable

decree nisi should not be made absolute in England nor a decree granted in Scotland until the court is satisfied that the arrangements proposed for the care and upbringing of any children under sixteen years of age are the best that can be devised in the circumstances.¹⁴ The court should also be empowered to make custody orders where the petition is refused¹⁵—in England on the application of either party where a maintenance order has been made under the Matrimonial Causes Act, 1950, s. 23,¹⁶ and in Scotland in an action for adherence.¹⁷

As a further means of bringing home to the parties their continuing parental responsibility, it is recommended that divorce¹⁸ cases in London in which there are children under sixteen years of age should be placed on a special list of causes for hearing. In England applications for custody should,¹⁹ so far as practicable, be dealt with immediately after the divorce issue has been tried, and where this cannot be done, if possible the judge who tried that issue should deal with the children. The effect of this procedure would surely be that a certain number of judges in the Divorce Division of the High Court, who decide the petitions on the special list, would acquire specialised experience in supervising arrangements for children whose troubled domestic background is being dissolved. In view of the summary nature of the procedure in the magistrates' courts in England, the Commission does not consider it desirable to make the granting of relief there dependent on the suitability of arrangements made for the children,²⁰ and unfortunately the Report does not stress, as it might have done, the importance of magistrates satisfying themselves that the best possible arrangements are being made for the children, whose welfare is no less important and no less in jeopardy.

A recommendation²¹ that in England the court should have power, whenever a question of paternity or custody is in issue, to order separate representation of the children, is welcome for

development, and recommends its extension to Scotland (where the staff should be recruited from members of an existing statutory service—para. 416, p. 116) and the towns in England and Wales at which matrimonial cases are tried (at each of which there should be an officer drawn from the probation rather than the children's service—paras. 369 and 387–391, pp. 105, 109–110).

¹⁴ Paras. 373, p. 106 and 414, p. 115. In both countries the court should have power in exceptional circumstances to grant the decree on an undertaking by the successful party to bring the question of the arrangements for the children before the court within a specified time.

¹⁵ Para. 402, p. 113. In Scotland this would apply only on the application of either party: para. 417, p. 117.

¹⁶ Para. 403, p. 113.

¹⁷ Para. 418, p. 117.

¹⁸ The recommendation is confined to divorce cases in London, see para. 404, p. 112; it is thought that the arrangement might prove impracticable in the provinces. Both restrictions seem unjustifiable in a matter of such importance.

¹⁹ Para. 382, p. 108.

²⁰ Para. 409, p. 114; but these arrangements would apply in the Sheriff Courts in Scotland, see para. 419, p. 117.

²¹ Para. 927, p. 243.

its own sake and because it could eventually lead to the recognition of independent rights in the child. At present the father's duty in private law to maintain his children is a duty owed to his wife, enforceable both in the High Court²² and the magistrates' courts²³ on her application; payments are made to her and are expendable at her discretion.²⁴ The recommendation²⁵ that the duty of maintenance should lie equally on both parents does not meet this difficulty.

In both countries it is intended that these recommendations should extend, in all courts having jurisdiction to make custody orders, not only to the legitimate, legitimated or adopted children of the two spouses, but also to the illegitimate children of both,²⁶ the legitimate, adopted or illegitimate children of either and other children (excluding boarded-out children) living in family with the spouses and maintained by one or both of them when the home broke up.²⁷ The courts should also have not only the power, as at present, to make an order in favour of the spouse applying for custody of the child, but, if the conditions offered by the parent

²² The wording of the Matrimonial Causes Act, 1950, s. 23, is quite clear.

²³ The Summary Jurisdiction (Married Women) Act, 1895, s. 4, as explained in *Kinnane v. Kinnane* [1954] P. 41.

²⁴ She is not a trustee: *Stevens v. Tirard* [1939] 2 K.B. 410, a tax decision.

²⁵ Para. 568, p. 153.

²⁶ This accords with the welcome decision of the House of Lords in *Galloway v. Galloway* [1956] A.C. 299, reached when the Report was in draft.

²⁷ Paras. 393, p. 110, 410, p. 114, 417, p. 116 and 419, p. 117. This will bring the definitions of a *family* and a *child* for the purposes of custody orders much nearer to the definitions used in the recent social legislation. By the Family Allowances Act, 1945, s. 3, a *family* means:

- (a) a man and his wife living together, any children being issue of either or both of them or being maintained by them,
- (b) a man not living together with his wife, any children being issue of his or maintained by him, and
- (c) a woman not living together with her husband, any children being issue of hers or maintained by her.

By s. 21, a *child* includes (1) the legitimate issue of a deceased spouse by an earlier marriage; (2) the illegitimate issue of a deceased spouse by the person with whom the child is living, unless the marriage was terminated otherwise than by the deceased spouse's death; (3) a legitimated child; (4) an adopted child within the meaning of the Adoption of Children Act, 1926 (now the Adoption Act, 1950). But an illegitimate child is not, for the purposes of the Act, treated as being issue of his father.

By the National Insurance Act, 1946, s. 78, and the National Insurance (Industrial Injuries) Act, 1946, s. 88 (2), a child is a person who would be treated as a child under the Family Allowances Act. By the National Insurance Act, 1946, s. 23 (2), where the beneficiary is a man, a child of the family of any woman for the time being residing with him is treated as a child of his family, if the child: (a) is an illegitimate son or daughter of theirs, or (b) was born not less than six months before the day for which benefit is claimed and was maintained by the beneficiary for six months before that day.

By the Income Tax Act, 1952, s. 212, a *child* for the purpose of the dependent child's allowance is a person living with the claimant at any time within the year of assessment who is either under the age of 16 or is receiving full-time instruction at an educational establishment. The expression includes a stepchild, an illegitimate child whose parents have married each other after his birth, and any other child maintained by the claimant in respect of whom no other person receives tax relief.

were really bad, should be able to make an order in favour of a third person (preferably a relative of the child), or even require a local authority to receive the child into its care, after which neither parent nor any other person should be able to reclaim him without an order of the court.²⁸ The court should also be able to place the child under the supervision of a welfare officer for such time as it thinks fit, and having once done so, could re-open the question of custody at any time on its own motion. These recommendations would be sufficiently wide to cover the facts²⁹ of such cases as *Re A.B.* (an infant)³⁰ or *Watson v. Nikolaisen*,³¹ where the arrangements proposed by the mother of an illegitimate child were unsatisfactory. In view of doubts expressed, it is recommended that the authority of probation officers to make inquiries at the request of magistrates in connection with custody should be placed beyond dispute by statute.³²

The Commission also seeks to deal with the recent crop of cases in which parents have evaded the law by removing children from the jurisdiction of the courts whilst applications concerning their custody are pending, and accordingly recommends³³ that at any time after the institution of matrimonial proceedings in the High Court in England or the Court of Session or Sheriff Court in Scotland, either spouse, or the guardian of any children for whom the court may make custody orders, or any other person having or wishing to obtain custody of such a child, should be able to apply *ex parte* for an injunction or interdict prohibiting, without an order of the court, the removal of the child from the jurisdiction, or from the control of the person in whose charge he is.³⁴ A custody order made in the High Court in England, or the Court of Session or the Sheriff Court in Scotland, should be enforceable without further inquiry in the other country for a year after the children were last in the country in which the order was made; during this period, application regarding custody should be made in the court that granted the original order.³⁵ The extension of these provisions to orders made in the magistrates' courts in England is not recommended, in view of the possibility of overlapping jurisdiction in the courts of the two countries.³⁶

The two remaining matters concerning children are likely to affect far less children than the above, but they have more

²⁸ Paras. 395, p. 111, 417, p. 116 and 411, p. 115.

²⁹ But only if the facts emerged in matrimonial proceedings, see note 10, *ante*. Since both these cases concerned illegitimate children no such proceedings arose.

³⁰ [1954] 2 Q.B. 385, C.A.

³¹ [1955] 2 Q.B. 286, D.C.

³² Para. 412, p. 115.

³³ Para. 423, p. 118.

³⁴ Since there is at present no machinery in Scotland, as there is in England, designed to prevent children being taken abroad in contravention of an order of the court, the Commission recommends that it should be introduced there; see para. 424, p. 118.

³⁵ Para. 427, p. 119.

³⁶ Para. 428, p. 119.

fundamental repercussions on the concept of marriage. The unanimous recommendation³⁷ that England should adopt the Scottish version of the putative marriage deserves a hearty welcome. The effect would be that children born of a void marriage would be deemed legitimate if one or both parents were ignorant of the impediment to the marriage, and not simply of the law rendering the marriage void. There can be no doubt that English law has been unduly slow in relieving children of punishment for their parents' errors. Not until 1949³⁸ were children of marriages voidable for incapacity or wilful refusal to consummate deemed to be legitimate. In English law the child of any void marriage is still automatically illegitimate, although Denning L.J. had a doubting dictum in 1953.³⁹ Given a genuine mistake of fact on the part of one or both parents, no principle of public policy would seem to require the bastardising of the children.

A startling and controversial majority recommendation,⁴⁰ however, is that there should be no change in the law⁴¹ that a child cannot be legitimated by the subsequent marriage of his parents if either parent was married to a third person when the child was born.⁴² The arguments in the Report against legitimation of such children appear somewhat confused.⁴³ The present law is difficult to justify on the basis of upholding the vested rights of the legitimate children, who have in fact no rights of succession. Even in the event of intestacy they will now generally be deferred

³⁷ Para. 1186, p. 306.

³⁸ By the Law Reform (Miscellaneous Provisions) Act, 1949, s. 4, re-enacted in the Matrimonial Causes Act, 1950, s. 9. The reform in 1949 followed the case of *Dredge* [1947] 1 All E.R. 14, in which a child of sixteen conceived before but born during his parents' marriage became illegitimate when the marriage was annulled for wilful refusal to consummate. Children of the parties to a marriage voidable for unsound mind or venereal disease were deemed legitimate by the Matrimonial Causes Act, 1937, s. 7 (2), now the Matrimonial Causes Act, 1950, s. 9.

³⁹ In *Wiseman* [1953] P. 79, he said: "the child was legitimate when born, and the doctrine of relation back has never been applied so as to render unlawful that which was originally lawful." In this case a husband petitioner obtained a decree of divorce from his wife, and remarried soon after the decree absolute. Long after the time for appeal had passed, and a child had been born of the "second marriage," the "first" wife obtained leave to appeal against the decree, which was set aside. It is difficult to see how the child of the "second marriage" can have been legitimate when born, without the introduction of some doctrine of putative marriage.

⁴⁰ By a majority of twelve to seven. The majority understandably includes the nine members who are opposed to the dissolution of a marriage that has irretrievably broken down, but they are more surprisingly supported by three members who are prepared to accept that principle.

⁴¹ The Legitimacy Act, 1926, s. 1 (2).

⁴² Para. 1182, p. 305.

⁴³ In para. 1179 at p. 304, the majority states: "the basic argument against the proposal . . . is that it would result in a serious weakening in respect for marriage," but in the next paragraph it continues: "This . . . is the essence of the objection to the proposal. Legitimacy is the status held by a lawful child of the marriage. Any departure from that conception can only be made by ignoring the essential moral principle that a man cannot, during the subsistence of his marriage, beget lawful children by another woman."

to the rights of a surviving (subsequent) spouse.⁴⁴ Nor does the Commission itself consider any possible distinction between cases in which there are, and those in which there are not, legitimate children of the subsisting marriage. Moreover, if legitimation by subsequent marriage were extended to children born in adultery, they would not become the legitimated children of the marriage subsisting at the time of their birth, but of the later marriage between their parents. Since the same practical effects can be achieved by adoption as by legitimation, it is also difficult to see how the present law strengthens respect for marriage.

Some of the difficulties of the subject are illustrated by the fact that the Commission feels compelled to recommend⁴⁵ the alteration of the apparently more logical Scottish rule, which looks to the state of affairs at the time of the child's conception, so that in Scotland as in England the child's legitimacy or otherwise may in future depend on the length of the law's delays as well as the vagaries of biology.

MAINTENANCE⁴⁶ AND ALIMENT

For a spouse

In both England and Scotland it is a rule of the common law that a man must maintain his wife. In English law, however, the husband's duty was terminated by his wife's adultery, and the courts have recently held⁴⁷ that her desertion has the same effect. In Scottish law, the husband's liability is not ended by his wife's adultery, but it is if she leaves the home unjustifiably and rejects his offer to take her back, or if she has sufficient means to support herself, or if the marriage is annulled or dissolved.

The power of the Scottish courts to order a husband to aliment his wife has developed at common law, but in England, although the husband's duty to maintain his wife was laid down in sweeping terms, the only method of enforcement known to the common law was the wife's power to pledge her husband's credit for necessities,⁴⁸

⁴⁴ By the Intestates' Estates Act, 1952, under which the surviving spouse, whether or not living with the deceased, or guilty of a matrimonial offence, takes the personal chattels and the first £5,000 of any estate. The Matrimonial Causes Act, 1950, s. 21 (1) provides that in case of judicial separation a wife's property devolves on her death intestate as if her husband were dead. There is no corresponding provision in respect of her husband's property, to which she is therefore entitled to succeed unless excluded by his will. Although it considers the effect of divorce on a will (para. 1189, p. 306) the Commission makes no reference to this extraordinary anomaly.

⁴⁵ Para. 1183, p. 305.

⁴⁶ In accordance with the recommendation of the Commission (para. 521, p. 143), this term is used hereafter to include any money paid by one spouse for the maintenance of the other, and the term "maintenance order" for any order which any English court has power to make for such payments.

⁴⁷ *National Assistance Board v. Wilkinson* [1952] 2 Q.B. 648, D.C.

⁴⁸ This can be considered under three headings: (1) Her right whilst managing his household to pledge his credit for ordinary household necessities (although most of the cases concern clothes) at the standard of living he has chosen

which of course depended upon the husband's having credit to pledge, and the willingness of tradesmen to take upon themselves the onus of extracting payment from a man whose wife was unable to do so. The power to make maintenance orders therefore rests in England upon statute, and since the husband's duty is to maintain his family at the standard of living he chooses to adopt,⁴⁹ the "wilful neglect to provide reasonable maintenance" seems to mean, when the parties are living together, failure while possessing the means to do so to provide the bare necessities of life. Only if the wife can prove such failure can she, by application to the court, enable the court's assessment of reasonable maintenance (subject to a low upper limit in the magistrates' courts) to be substituted for that of her husband. Several attempts have been made by certain women's organisations to give the wife a legal right either to claim a certain proportion of the family income for household expenses, or to apply to a court for determination of reasonable provision.⁵⁰ The Commission is probably right to reject⁵¹ any intervention by the general law, which on such matters moves at its peril too far from the prevailing social climate, on which enforcement in the majority of cases must ultimately depend. The main difficulty arises when the social conventions of certain groups fail to relate the "normal" housekeeping allowance to the husband's actual earnings.⁵² For similar reasons, but with more doubtful justification, the Commission

to adopt. This right depends on the relationship of householder and housekeeper, and that of husband and wife is neither necessary nor sufficient: see *Debenham v. Mellon* (1880) 6 App.Cas. 24, *Gray v. Cathcart* (1922) 38 T.L.R. 562. (2) Her right of last resort when living with him to pledge his credit for the bare necessities of life. (3) A similar right when living separately from him without fault on her side to pledge his credit for necessities at the standard of living he has chosen to adopt: *Manby v. Scott* (1660) 1 Mod. 138, particularly the judgment of Hyde J. quoted by Blackburn J. in *Bazeley v. Forder* (1868) L.R. 3 Q.B. 559; *Biberfeld v. Behrens* [1952] 2 Q.B. 770. In *National Assistance Board v. Parkes* [1955] 2 Q.B. 506, the Court of Appeal has fortunately disposed of the troublesome distinction which the Divisional Court had attempted to make, where the parties separated by consent, between the cases where the husband had and those in which he had not impliedly undertaken to maintain his wife, see, e.g., *Stringer* [1952] P. 171.

⁴⁹ This is the classic principle, but how far it now applies in view of the wording of the Matrimonial Causes Act, 1950, s. 23, is doubtful. The erosive possibilities of such decisions as *Dunn* [1949] P. 98 have also not yet arisen for consideration. If a wife has an equal voice in where the matrimonial home is to be, and can refuse for adequate reason to move from one home to another, she would seem also to have a considerable voice in the standard of living the spouses are to adopt.

⁵⁰ See the Women's Disabilities Bill, 1952, and para. 1044, p. 272 of the Report.

⁵¹ Para. 1044, *supra*.

⁵² There appears to be considerable evidence that amongst groups of industrial workers a fixed sum is regarded as "normal" for housekeeping expenses, irrespective of the husband's actual earnings. Cf. the views of Sir F. Burrows, a former President of the National Union of Railwaymen, pp. 342-344, and note 63, *post*.

rejects the suggestion that either party should be entitled to disclosure of the other's financial position.⁵³

It says much for the lawyers' reverence for traditional remedies, however inadequate, that whilst the poorer woman (whose right to pledge her husband's credit was obviously useless) was given in 1878⁵⁴ the right to obtain a maintenance order in the magistrates' courts, in the High Court no such order was available until 1949⁵⁵ without the prior institution of some other matrimonial proceeding. Now that maintenance orders are available in the High Court, however, the law and practice in the superior and inferior courts may be profitably compared.⁵⁶ An outstanding difference is that in the magistrates' courts a maintenance order is unenforceable while the wife resides with her husband⁵⁷ and lapses if she continues to reside with him for three months after the order was made. The order ceases to have effect if cohabitation is resumed.⁵⁸ The unnecessary and impolitic decision in *Evans*⁵⁹ established that a wife is residing with her husband within the meaning of the Acts so long as she lives under the same roof, even if she establishes a separate household. The effect is to force the breaking open of many marriages that might otherwise be mended, and to compel the wife, on behalf not only of herself but of any young children there may be, to choose between the protection of maintenance offered by the Summary Jurisdiction (Separation and Maintenance) Acts and the protection of a roof offered by the Rent Restriction Acts (as responsibly interpreted by the Court of Appeal). The

⁵³ On similar grounds the Commission rejects the suggestion that a wife's wilful neglect of her household duties should form a ground on which a husband could apply to the magistrates' court for relief (para. 711, p. 191). It seems unfortunate that no remedy is proposed for gross cases, such as *Kaslefsky* [1951] P. 38, C.A., where the wife not only took no part in the household duties, but refused to take any care of the child of the marriage.

⁵⁴ By the Matrimonial Causes Act, 1878, s. 4, if the husband had been convicted of an aggravated assault upon her. Under the Married Women (Maintenance in case of Desertion) Act, 1886, s. 1, she could obtain an order if her husband had deserted her and wilfully neglected to maintain her.

⁵⁵ By the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5, now the Matrimonial Causes Act, 1950, s. 23.

⁵⁶ It is submitted that the importance of maintenance orders in the magistrates' courts is generally underrated in the profession. Although the orders are for weekly payments, the total amounts involved may well run into thousands of pounds over the total period. The Commission's recommendation (para. 1151, p. 297) that legal aid should be extended to matrimonial proceedings in the magistrates' courts is greatly to be welcomed.

⁵⁷ By the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4), amending the Summary Jurisdiction (Married Women) Act, 1895, s. 4, according to which the husband's conduct must have caused the wife to live separately and apart from him before she could apply for a maintenance order.

⁵⁸ The Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2). There was no such provision in the Summary Jurisdiction (Married Women) Act, 1895.

⁵⁹ [1948] 1 K.B. 175, D.C.

absurd distinguishing that has followed the *Evans* decision⁶⁰ makes the situation more confused but scarcely more reasonable.

There are no such conditions of non-cohabitation or separate residence in the Matrimonial Causes Act, 1950, before maintenance orders can be made. Accordingly, the Commission unanimously recommends⁶¹ that the effect of the *Evans* decision should be undone, if necessary by legislation,⁶² and a maintenance order should be enforceable in the magistrates' courts where a wife has set up a separate household under the same roof as her husband. With one dissentient⁶³ it is also recommended⁶⁴ that the order should be enforceable even if full cohabitation continues, the maintenance being normally payable direct to the wife and not to the court collecting officer. No similar recommendation is made in regard to Scotland, where the courts will refuse an order for aliment if the wife continues to live in the matrimonial home.⁶⁵

The present gaps and anomalies in the High Court's powers to order payment of maintenance of a spouse are graphically demonstrated by a table in the Report,⁶⁶ and for comparison, the effects of the Commission's own proposals are similarly set out.⁶⁷ The principal recommendations are that the High Court should be empowered to make an order for maintenance in favour of either wife or husband after a decree of divorce, nullity of marriage, judicial separation or restitution of conjugal rights, or a finding of wilful neglect to provide reasonable maintenance.⁶⁸ Applications should generally be made in the petition, but it should be possible for the petitioner to apply for leave to make such application after the trial.⁶⁹ At present the court may order

⁶⁰ *Thomas* [1948] 2 K.B. 294; *Hewitt* [1952] 2 Q.B. 627. The effect is that if the parties are living under separate roofs when the order is made, or so live within three months of the order being made, the *Evans* decision does not apply and if they later set up separate households under the same roof the order remains enforceable.

⁶¹ Para. 1041, p. 271.

⁶² Denning L.J. attacked the decision in *Hopes* [1949] P. 227, and it may be hoped that if an opportunity occurs the Court of Appeal will themselves dispatch this mischievous authority.

⁶³ Sir F. Burrows, who also opposes any special rights for the wife in the matrimonial home as "an unwarrantable interference with property rights." He opposes liability under a maintenance order during cohabitation because: "The marital relationship is likely in many cases to be seriously strained if a wife who felt that she was not receiving a sufficient allowance from her husband could hold over him the threat that she would apply for a maintenance order. Capitulation in face of such a threat . . . is likely to increase rather than decrease marital strife." This sounds like a modern version of the older principle of "That admirable subjugation of the will of one sex to the pleasure of the other, for the mutual benefit of both."

⁶⁴ Para. 1049, p. 273.

⁶⁵ *M'Donald* (1875) 2 R. 705.

⁶⁶ Para. 512, pp. 140-141.

⁶⁷ Para. 520, p. 142.

⁶⁸ This phrase is here adopted as a short term for "wilful neglect by a husband to provide reasonable maintenance for his wife or children, or a wife's failure to maintain a destitute husband"; see para. 520, p. 142.

⁶⁹ Para. 509, p. 140. This will dispose of difficulties which have arisen in *Simmonds* [1955] 3 W.L.R. 129, and see *Practice Direction* [1955] 1 W.L.R. 520.

payment of maintenance by a husband to a wife in all these events, but may order such payments by a wife only in favour of a husband who has obtained a decree for restitution of conjugal rights. It is also recommended that orders for secured maintenance should be available for the life of the receiving spouse on a decree of divorce, nullity, restitution of conjugal rights or wilful neglect to provide reasonable maintenance,⁶⁸ but not on an order for judicial separation.⁷⁰

The most sweeping changes recommended are that settlement of the property of either spouse and lump sum payments in favour of the other may be ordered on a decree of divorce or nullity. At present there is no jurisdiction to order lump sum payments at all, and settlement of a wife's property only may be ordered at the instance of a husband petitioning for divorce, judicial separation or restitution of conjugal rights, but not of nullity.⁷¹ There is no recommendation that lump sums should be settled, although this would seem a most necessary precaution if folly and hardship are to be reduced.

The Commission finds in general that the practice in the magistrates' courts as regards maintenance orders is superior to that in the High Court. For example, it agrees that it is undesirable nowadays that a woman should receive maintenance if she is well able to support herself, and would in fact have had to do so if she had been left a widow, and recommends that, if it does not already do so,⁷² the High Court should have regard in every case to the wife's potential earning capacity, if she is not working at the time of the application, as well as to her capital. While accepting that a wife left with young children or incapacitated by age or illness is entitled to look for maintenance to her husband, it is considered that wives with no young children, or who have worked regularly during the married life together, or before the marriage when the separation follows not long afterwards, should be expected to make some attempt to support themselves after the breakdown of their marriage. All this accords with current practice in the magistrates' courts. In Scotland rather different criteria are applied. The courts will take account

⁷⁰ Nor is there such a power now on a decree of judicial separation.

⁷¹ The effect is to remove the court's power to make an order for settlement of the wife's property where the husband obtains a decree of judicial separation or restitution of conjugal rights, but to give power to make such orders when a decree of nullity is granted. See paras. 516 and 519, pp. 141, 142.

⁷² This is a reference to the decision in *Le Roy Lewis* [1955] P. 1, in which Barnard J. said that, although the wife was young and childless, and had worked as a shop assistant until her marriage five years previously, there was no reason why she, the innocent party, should go back to work in order to reduce the husband's liability to maintain her. The harmful social consequences of persons being maintained without any occupation but brooding upon their wrongs were not considered. The Commission suggests no remedy for the basic difficulty here, that the only way a court can express disapproval of a person's conduct is to make particularly favourable financial provision for the other spouse, with results that may not always be happy.

of the wife's separate property and her actual earnings, but will take her potential earnings into account only if she has previously held a paid occupation. No changes in these principles are suggested.

Nevertheless, the Commission reasonably points out that the standard of living enjoyed by the wife before marriage, her age and the position she has occupied in the community (factors more likely to be relevant in the High Court than in the magistrates' courts) must also be taken into account, although it emphasises that where the marriage has broken down and the husband's income is insufficient to support two establishments, both parties may have to endure a reduction in their standard of living. To allow a wife time to fit herself for suitable employment, the valuable suggestion is made that the High Court should have power to express a maintenance order to last, at its discretion, for a definite period, although this should not affect its jurisdiction to make a fresh order later.

The removal of a long-standing anomaly is suggested by the recommendation that, after the annulment or dissolution of a former marriage, any maintenance order made by the High Court or a magistrates' court should cease to have effect upon the remarriage of the receiving spouse.⁷³ Unfortunately the doctrine of freedom of contract, strenuously upheld on behalf of the General Council of the Bar in this inappropriate context,⁷⁴ is accepted to the extent that the general rule is to be subject to any agreement to the contrary made between the spouses. This means that it will still be open to the astute or well-advised spouse to bargain, to her own profit, for maintenance for life as part of the price for "giving the other his freedom."

Six members of the Commission⁷⁵ also consider it wrong in principle that either spouse should be called upon to maintain a guilty spouse.⁷⁶ The majority of thirteen seems little less complacent about the infallibility of the courts' findings, when it declares that they can be relied upon to make such an order only if it is reasonable in the circumstances, without stressing the importance of the court's exercising a real and wide discretion, and not shelving their responsibility by appeals to the decisions of judges long dead with regard to different persons in different times and circumstances. Even in recommending the elimination of anomalies in the powers of magistrates' courts to order maintenance

⁷³ Paras. 496, p. 136 and 1058, p. 275. But any provisions in a magistrates' court order for custody and maintenance of the children should remain in force unless the court otherwise directs.

⁷⁴ See also notes 15-21, *post*.

⁷⁵ Including the Chairman, see para. 503, p. 138.

⁷⁶ In cases of separation, for example, the task of deciding which, if either, of the spouses was guilty of desertion may be so invidious as to make the apportionment of guilt quite accidental.

for wives guilty of matrimonial offences,⁷⁷ no caveat is issued as to the care with which such additional powers should be exercised.

Since the Report was prepared, the Court of Appeal has reversed the decision of the Divisional Court in *Marczuk*⁷⁸ and held that a maintenance order must be discharged in the magistrates' courts even though the husband has condoned his wife's subsequent adultery, although a fresh order may be made. This decision is so clearly subversive of morals that even Parliament might be expected to find time to correct it. Another anomaly to which the Commission makes no reference arises when a maintenance order in the magistrates' courts continues to run after a subsequent divorce decree; since the woman is no longer married, her former husband then has to undertake the absurd task of proving that her partner in misconduct is himself married, so that the act becomes adultery within the meaning of the statute.⁷⁹

It is implicit in the above that the Commission considers the right of a husband to apply to the courts for provision to be made for him by his wife to be too restricted, and recommends⁸⁰ that a husband should have an equal right with a wife to apply for a maintenance order in the High Court, which should have discretion to decide in what circumstances a wife should be required to make provision for him, although he is in no danger of becoming destitute.⁸¹ Moreover, a husband who is destitute and unable to support himself should be able to apply either to the High Court or a magistrates' court for a maintenance order against his wife if he can show that she has means more than reasonably sufficient for her own support, and has failed to support him.

If these recommendations are enacted, it will be interesting to see how the courts apply them. In settling a wife's property on granting a divorce for her adultery, for example, the High Court has adopted the criterion of the benefit the husband might have expected to receive from his wife's property had the marriage continued, with the result that a wife who is mean in money

⁷⁷ In para. 1054, p. 274, it is recommended that the maximum amount of maintenance that may be ordered by a magistrates' court should be increased, where the husband has obtained a separation order against his wife, to the same figure as may be ordered where it is the wife who complains against her husband. In para. 1005, p. 264, it is recommended that a magistrates' court should be given power, which it does not now possess, to order a husband to maintain his wife who has been found guilty of persistent cruelty to his children.

⁷⁸ [1956] 2 W.L.R. 849, C.A., of *Singleton and Romer L.J.J.*, with *Hodson L.J.* dissenting. The decision reversed that of the Divisional Court at 2 W.L.R. 1, quoted on p. 275 of the Report.

⁷⁹ The Summary Jurisdiction (Married Women) Act, 1895, s. 7. Cf. *Abson* [1952] P. 55, where the order was rescinded because the paramour was proved to be married, and *Chorlton* [1952] P. 169, where the order stood because although the husband proved misconduct he had no evidence as to the marital status of the paramour.

⁸⁰ Paras. 499, p. 137 and 515-518, pp. 141-142.

⁸¹ Para. 500, p. 137.

matters finds adultery less expensive than her more open-handed sister.⁸²

A further recommendation is that the High Court should have a power similar to that possessed by the Scottish courts, on being satisfied that a husband or wife is missing and cannot be traced, to order if it thinks fit⁸³ that provision be made from the income of the estate of the missing spouse for the maintenance of the remaining spouse or children, and for this purpose to appoint a receiver of the estate of the missing spouse. With one dissentient⁸⁴ the Commission recommends that, where the income of the property is insufficient to support the remaining spouse and children, the court should also be empowered to direct the receiver to award sufficient of the capital for the purpose. In cases where one of the former spouses dies after an annulment or dissolution of a marriage it is also recommended that the High Court should be able to make an order for provision for the survivor from the deceased's estate by way of periodical maintenance until the death or remarriage of the receiver, or of a lump sum.⁸⁵ The Commission also considered that arrangements should be made for a wife who has divorced her husband to be able to claim a pension in right of the contributions he had made to the National Insurance Fund during the marriage, and an allowance for children living with her on the lines of the widowed mother's allowance. These views have been communicated to the National Insurance Advisory Committee.⁸⁶

The recommendation of the Gorell Commission⁸⁷ that the court should have power to issue an injunction to restrain the husband from defeating his wife's rights by disposing of his property pending her application for maintenance is not supported, but instead the Commission recommends⁸⁸ that either spouse may apply within a year of obtaining a maintenance order for an order setting aside any disposition of property made by the other spouse (or former spouse) within three years of the order being made. Such an order is not, however, intended to defeat the rights of any bona fide purchaser for value. The reason given for preferring this alternative, *viz.*, that neither spouse has a right to maintenance, which is in the discretion of the court, seems quite inadequate. English law is woefully deficient in methods of preventing persons from defeating justified claims upon them by dissipating their assets, and it is lamentable that the Commission

⁸² See, e.g., *Style v. Style & Keiller* [1954] P. 209, and (1954) 17 M.L.R. 172.

⁸³ This would include cases in which the marriage had been dissolved or annulled.

⁸⁴ Sir F. Burrows.

⁸⁵ Para. 524, pp. 143-144. Again there is no recommendation for the settlement of lump sums.

⁸⁶ Paras. 712-716, pp. 190-191.

⁸⁷ Cmd. 6478, para. 441.

⁸⁸ Para. 534, p. 146.

should have fallen back on a cumbersome, expensive and ineffective cure rather than the effective preventive suggested in 1912.

THE ENFORCEMENT OF MAINTENANCE ORDERS

The most important unsolved problem in respect of maintenance orders is that of enforcement in the magistrates' courts, since the husband has rarely any money or property available for distraint. If he fails to pay, he can be sent to prison, but this produces no money. The Commission finds⁸⁹ that the power to attach a man's income is in effect a dead letter, since there are so many statutory restrictions on its use.⁹⁰ That the problem is considerable is shown by the substantial number of men imprisoned each year for default.⁹¹ Many witnesses before the Commission favoured attachment of the man's wages to meet maintenance payments. The Report sets out at length⁹² the arguments for and against such a system and in the end rejects it⁹³ because it would fail to deal with the man who will go to prison rather than pay the maintenance ordered; such a man would simply give up his job if his wages were attached. This seems another example of a fairly strong group opinion opposing both attachment of a man's wages and payment of maintenance to wives. A possible method of tackling the problem which the Commission did not consider is to separate orders for the maintenance of children from those for the maintenance of wives. Many of the men who go to prison rather than pay maintenance are convinced, however mistakenly, that their wives have treated them badly and forfeited their right to maintenance. If orders for maintenance of children were made separately, and the right placed not in the wife, but in the children, much of the opposition might be deflected.

Similarly, in considering the problem of tracing a missing husband, the Commission considered suggestions that Government Departments should be required to make available to an officer of the court information in their possession as to the husband's

⁸⁹ Para. 1089, p. 281.

⁹⁰ It is even doubtful if attachment is applicable to maintenance orders.

⁹¹ More exact information on the numbers involved, the grounds on which orders are made, and the total number of orders in operation at any particular time, is of course necessary before the problem can be squarely faced, but in para. 1153, p. 297, the Commission concludes that the value of such information would not justify the cost of collecting it.

⁹² Paras. 1100-1105, pp. 283-285.

⁹³ Para. 1107, p. 285. But in para. 1108 it is recommended, with two dissentients, that committal to prison should not cancel arrears of maintenance in respect of which the imprisonment was imposed, but that there should be no second committal for the same arrears. No change is recommended in the present rule that arrears do not accumulate during imprisonment. The Parliamentary Under-Secretary for Home Affairs, Lord Mancroft, drew the attention of the Magistrates Association on October 18 last to the fact that some four thousand persons are sent to prison each year for civil debt, usually default in payments under a maintenance order. This is a serious factor in the present overcrowding of the prisons and inhibits penal reform.

whereabouts, or that, where a summons could not be served, a warrant might be issued, since the police might succeed in finding him where other means failed. In rejecting both these solutions⁹⁴ the Commission says: "Against the right of a wife to maintenance must be balanced the right of the husband to have his privacy respected; in our view the latter must prevail." If the contest were between the man's privacy and the direct claim of children for whose existence he is responsible, would the answer necessarily be the same?

Like the Gorell Commission and the Denning Committee before it, the Commission finds the enforcement of maintenance orders in the magistrates' courts superior to that in the High Court⁹⁵ or the county court. It is therefore recommended⁹⁶ that, unless the High Court otherwise directs (*e.g.*, at the request of both parties), maintenance orders made⁹⁷ in that court within the financial limits that bind the magistrates' courts should be sent as of course for registration in the appropriate magistrates' court and thereafter payments should be collected and the orders enforced as if they had originated there. Orders for amounts in excess of these limits should be registrable in the magistrates' courts if so directed by the High Court or on the subsequent application of either party.⁹⁸ Orders so registered would be transferable back to the High Court on the application of either party or by the magistrates' court. This seems an admirable suggestion, which will help to eliminate anomalies in the different courts.

One such anomaly relates to income tax. Maintenance orders in the magistrates' courts are classed as "small maintenance orders" deductible from the payer's income before assessment to tax, but the same rule applies in respect of orders made in the High Court only up to the financial limits applicable before December, 1949, to orders in the magistrates' courts, *viz.*, £2 per week for the maintenance of the wife and 10s. for a child. The Commission recommends⁹⁹ that High Court orders should be subject to the same rules as regards tax as those made in magistrates' courts.

Further recommendations are made that when matrimonial proceedings are pending in the High Court, a magistrates' court should be empowered to make an interim maintenance order, to

⁹⁴ Para. 1148, p. 296. The Commission also thought it inexpedient to add to the duties of the police at the present time that of making a special search for a missing husband in order to enable his wife to start matrimonial proceedings.

⁹⁵ Notwithstanding the improvements effected in enforcement procedure by the Matrimonial Causes (Judgment Summons) Rules, 1952.

⁹⁶ Para. 583, p. 158.

⁹⁷ Including orders varied by the High Court so as to come within the limits binding on the magistrates' courts, para. 587, p. 159.

⁹⁸ Para. 585, p. 158.

⁹⁹ Para. 589, p. 159.

operate until the High Court proceedings have terminated,¹ and that when a wife who has obtained a maintenance order leaves the United Kingdom, the husband's liability to make payments under the order should be suspended after she has been absent for a month and remain suspended so long as she stays away.²

In one respect, however, the procedure in the magistrates' courts is found to be woefully defective, namely, in respect of arrangements for the hearing of matrimonial cases. The National Association of Probation Officers found that in only 74 out of 256 courts surveyed was the matrimonial work completely separate from the other business of the court, whilst in more than half of the others the matrimonial cases were taken at the end of the ordinary day's list, so that women and young children must sit about all day at the court among criminals and their associates. The General Council of the Bar also criticised the lack of time to deal properly with such cases, and the many adjournments required. Revelations of this nature might have shaken the Commission's complacency that all was for the best in the magistrates' courts³ and might have caused them to hesitate before summarily dismissing suggestions for family courts, or even for the special training or selection of magistrates for such work.⁴ It is difficult to reconcile their support for the principle (introduced as a result of public pressure) that both sexes should be represented on the bench of lay magistrates, with their declaration that there is no reason why stipendiary magistrates should not continue to sit alone. Consideration of the narrow circles from which stipendiary magistrates are recruited would clearly have led the Commission beyond their terms of reference, but it might have been more honest to say so.

In the event, the Commission restricts itself to recommending⁵ that in all courts the work of hearing domestic proceedings should be handled by itself and apart from the other work of the courts, on a day or half-day when no other business is taken, or in a separate room or different building from the ordinary cases. As at present, applications for the discharge of matrimonial orders should rank as domestic proceedings,⁶ and the magistrates should have power so to treat applications for variation if they see fit.

On the matter of appeals, the Commission rejects,⁷ with three dissentients, the proposal that there should be a right of appeal

¹ Para. 1061, p. 275.

² Para. 1052, p. 273.

³ Paras. 994-998, pp. 262-263, but *cf.* para. 1027, p. 268. Why, since the magistrates' courts are so highly thought of, should the Commission think that if orders could be made in magistrates' courts on grounds of cruelty, instead of persistent cruelty, orders might be obtained in circumstances in which relief was not really justified?

⁴ Para. 997, p. 262.

⁶ Paras. 1082-1084, p. 280.

⁵ Para. 1079, pp. 279-280.

⁷ Paras. 1134-1135, p. 292.

by way of rehearing on questions of fact to quarter sessions, and considers it essential that the present appeal procedure should continue, so that the Divorce Division of the High Court can exercise a controlling and supervisory role over the matrimonial jurisdiction of magistrates' courts.⁸ There is also much to be said for keeping the Divorce Division in constant touch with the trend of cases in the magistrates' courts,⁹ and the effect of its own decisions. That, as now recommended,¹⁰ a complete record of what was said in the magistrates' court should be available to the Divisional Court on appeal, and that the magistrates' court should be notified of the result of an appeal from its decision and receive a transcript of the judgment of the Divisional Court where desirable, would seem axiomatic.

Maintenance of children

There is no suggestion in the Report that the possibility of vesting the right to maintenance in the child, as distinct from the other parent or guardian, was at any time considered by the Commission. Although the courts have fortunately intervened to prevent a wife overtly bargaining away her right to apply to the court for maintenance of the children,¹¹ there is no way of compelling her to enforce the duty of maintenance unless the child becomes a charge on the public authorities. It is, however, recommended that husband and wife should be jointly liable for the maintenance of their children, and the courts should have power in suitable cases to make orders against the mother as well as the father, both in matrimonial proceedings and under the Guardianship of Infants Acts, 1886-1951.¹² Orders for maintenance of children should be possible where the court leaves the children with the spouse who already has custody of them, or gives custody to one spouse or a third person, or requires a local authority to take them into care.¹³

Where there has been a decree of divorce or nullity, it should be possible for orders to be made against either spouse for periodical or secured maintenance in favour of the children up to the age of twenty-one, or for the settlement of property for their benefit. Orders for periodical or secured maintenance (up to the age of twenty-one) should also be possible if there has been a decree of restitution of conjugal rights or a finding of wilful neglect to

⁸ Para. 1135, p. 292.

⁹ There is perhaps slightly less need of this now that legal aid is in operation in the High Court. There can be little doubt that members of the Divorce Division have learned a great deal in recent years of how poorer families really live.

¹⁰ Paras. 1136-1138, p. 293.

¹¹ *Hyman* [1929] A.C. 601; *Bennett* [1952] 1 K.B. 249, C.A.

¹² Para. 569, pp. 153-154.

¹³ Para. 575, p. 155.

maintain, and for periodical maintenance in any other circumstances, including judicial separation.

It is recommended¹⁴ that the courts should be empowered to make maintenance as well as custody orders not only for the children of the marriage, but also for the illegitimate children of the two spouses, and the legitimate, adopted or illegitimate children of either of them, and any others except boarded-out children who were living in family with the spouses and were maintained by one or both of them at the time the home broke up. Magistrates should also be able to make an order (either under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, or the Guardianship of Infants Acts, 1886-1951) for the maintenance of a child of sixteen years or over to enable the child to undergo a course of education or training, even although no previous order has been made.

Maintenance agreements

Evidence given to the Commission by the General Council of the Bar did not in general favour reform in the law, whether already effected or proposed. The Council recommended that legislation should be passed to modify the effect of the judgments in *Bennett*¹⁵ and *Tulip*,¹⁶ so that maintenance agreements should be binding between parties who entered into them. The Law Society, less tremulous in the face of reforming tendencies, accepted the decision in *Bennett*, but sensibly suggested that an agreement entered into before that decision should be valid and enforceable if the former husband had since died. The Commission, as a compromise, recommends¹⁷ that as a general rule maintenance agreements should be binding and enforceable, but not as regards any undertaking by the wife not to apply to the court for maintenance for the children. On the application of either party, however, showing that owing to fresh circumstances the financial terms have become inequitable, the High Court should be able to cancel or vary the whole or part of the agreement, and to make an order providing for the maintenance of one party, or of the children, by the other.¹⁸ The magistrates' courts would be able to deal only with the maintenance terms of such agreements within the limits for which they are empowered to make maintenance orders.¹⁹ Any order so made by either court would be enforceable in the same way as a maintenance order made by that court on the complaint of either party.²⁰ The effect would be that such agreements, often entered into without full disclosure of the financial position of the other party, and generally to the advantage of the financially stronger party (profiting from better

¹⁴ Para. 575, p. 155.

¹⁶ [1951] 2 All E.R. 91.

¹⁸ Para. 729, p. 194.

²⁰ Para. 732, p. 195.

¹⁵ [1952] 1 K.B. 249.

¹⁷ Para. 727, p. 194.

¹⁹ Para. 730, p. 195.

legal advice), would be enforceable notwithstanding their inequity, unless this was due to change of circumstances.²¹ The attitude of the Bar Council does not suggest that the courts are likely to adopt a noticeably liberal interpretation of their suggested powers.

The Commission does not discuss, much less attempt to clarify, the confused situation which exists as to the effect on a maintenance agreement of adultery,²² a judicial separation,²³ a divorce²⁴ or of the death of the paying party.²⁵ This is one of the darker corners of the law on which one might have hoped for a little light.

ALIMENT AND LEGAL RIGHTS IN SCOTLAND

In turning to Scottish law, the Commission was faced with the completely different set of problems arising in a highly logical system of law. On divorce, the obligations of marriage are regarded as terminated,²⁶ but the innocent spouse is entitled to his or her legal rights, unless previously renounced, either under any marriage settlement, or against the property of the guilty spouse as if the latter were dead.²⁷ After a decree of nullity

²¹ In making its recommendation the Commission refers to "fresh circumstances" in general terms, as it does also in setting out the effect of its recommendation on the wife, but the effect on the husband is said to be that he will have the right to apply to the court "if warranted by a change in his or his wife's circumstances." True, the husband is less likely to be affected by general deflationary tendencies than is the wife by an inflationary situation, but it seems unnecessary to rule out general circumstances in enabling him to apply to the court. ²² *Morrall* (1881) 6 P.D. 98.

²³ The decision in *Gandy* (1882) 7 P.D. 168, that a wife may not claim alimony in the courts on a judicial separation because of a covenant not to do so, can probably no longer stand with *Tulip* [1951] P. 378, C.A., *Bennett* [1952] 1 K.B. 249, C.A., and *N. A. B. v. Parkes* [1955] 2 Q.B. 506, C.A. Two members of the Lords were prepared to overrule it in *Hyman* [1929] A.C. 601, and the Commission has lost the opportunity of finally burying a decision which reflects little credit on the law.

²⁴ Divorce does not automatically end a separation agreement: *Charlesworth v. Holt* (1873) L.R. 9 Exch. 38, but the comments of Scrutton L.J. in *May* [1929] 2 K.B. 388, 392 might have merited the Commission's attention. In *Cooper v. Cooper & Ford* [1932] P. 75, a separation deed was held to be a marriage settlement variable by the court under the Judicature Act, 1925, s. 192, now the Matrimonial Causes Act, 1950, s. 25. This is surely a question of substance on which the views of the Commission might have been expected, once separation and maintenance agreements were being considered.

²⁵ In *Kirk v. Eustace* [1937] A.C. 491, a covenant by a husband to make weekly payments to his wife during her life was held enforceable against his estate after his death, but the Court of Appeal has held that where there is no express provision, the presumption is that the deed is intended to operate only during the life of both parties: *Lanstone v. Hayes* [1946] K.B. 491; dicta to the contrary by Lord Atkin in *Kirk v. Eustace* were ignored. The Commission's recommendation (para. 524, pp. 143-144) that the court should have power to make a maintenance order against the estate of a deceased spouse should solve the anomaly ventilated in *Hinde* [1953] 1 W.L.R. 175, C.A.

²⁶ Except where a divorce is obtained on grounds of incurable insanity, when the court may order financial provision to be made for the insane spouse.

²⁷ But a husband who divorces his wife cannot claim the *jus relicti* to which he is entitled on his wife's death under the Married Women's Property Act, 1881. Since legal rights on divorce do not attract death duties, a divorcing spouse receives considerably more property than a surviving spouse.

no rights or provision of any kind can, logically enough, be claimed by either party. The fact that legal rights are applicable to property but not to income causes so much hardship that the Mackintosh Committee²⁸ recommended²⁹ the abolition of the system in favour of one under which it should be left to the court in each case to determine what provision should be made for the innocent spouse. This recommendation is supported by the present Commission³⁰ with two dissentients.³¹ With one dissentient³² the Commission also recommends³³ that the court should have power to vary the terms of any marriage settlement, and that such orders should be available in respect of the property of a living defender or the estate of one who has died since the granting of the decree. The court should also be able to reopen transactions by a husband to defeat his wife's claims to *jus relictæ*.³⁴ When a divorce is granted on the grounds of the defender's incurable insanity, the Commission unanimously recommends³⁵ that the court should have power to order provision to be made for the pursuer and any children. The suggestion³⁶ that the court should have the widest discretion to make provision for either party after pronouncing a decree of nullity is as desirable as it appears illogical, but there is no such reasonable suggestion that the "guilty" party to a divorce might in some circumstances be entitled to maintenance or property.

With a view to reducing delay and expense, the Commission recommends³⁷ that during the continuance of the marriage a wife or husband should be able to bring an action for separation and aliment or adherence and aliment in the Sheriff Courts by a simplified procedure, on the lines of that followed in the Small Debt Court,³⁸ for aliment not exceeding £5 per week for a spouse and £1 10s. for a child; this will in fact be the Scottish equivalent of the complaint in the magistrates' courts in England, but although it is thought desirable that payments under such orders should be made to an officer of the court, which should also assist in enforcing the order, the Commission suggests that this

²⁸ The Committee of Inquiry into the Law of Succession in Scotland, 1951.

²⁹ Cmd. 8144.

³⁰ Para. 553, p. 150.

³¹ Lord Keith of Avonholm and Mr. Young; but other Scots were among the majority. Both dissentients would give the innocent party the choice between legal rights and provision determined by the court, with a right for the defender to resist the pursuer's claim for legal rights on grounds of hardship.

³² Lord Keith of Avonholm, who does not agree that the court should have power to vary the rights vested in children of the marriage by the marriage settlement.

³³ Para. 554, p. 151.

³⁴ Para. 559, p. 152, and see para. 534, p. 145, note 88, *supra*.

³⁵ Para. 555, p. 151.

³⁶ Para. 557, p. 151.

³⁷ Para. 976, p. 257.

³⁸ Except that no decree should be granted without proof (para. 973) and that there should be an appeal on questions of law by way of a stated case to the Court of Session (para. 974).

proposal should be considered in the course of a general review of Scottish law. Another very desirable reform proposed³⁹ is that a wife who has been deserted or who has been compelled, by reason of her husband's conduct, to leave the matrimonial home should be able to apply immediately for aliment to the Sheriff Court or the Court of Session; a husband unable to maintain himself would have a similar right.

Few will read the Report as a whole without misgivings. Blind reliance on the infallibility of primitive concepts such as "guilt" and "innocence," as found by a court on evidence provided by the parties; an acceptance of views and figures at their face value, without the probing that only prolonged research could provide; an obsession with the sanctity of legal titles to property, all are here. But some hopeful tendencies emerge: the recognition of the claims to consideration of children, irrespective of their origins; the importance of stability, rather than mere continuance, of marriage; some emphasis on duty as a variant on arguments about rights. Rather surprisingly, the result is fairly wide agreement, on a rather pedestrian level, of what is a reasonable solution, at least for the simpler problems of marriage.⁴⁰

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³⁹ Para. 551, p. 150.

⁴⁰ Since these comments went to press there has been a debate on the Report in the House of Lords on October 24, 1956. The Lord Chancellor then said that action short of legislation was contemplated in regard to certain matters here discussed.

* Lecturer in Law at the London School of Economics, University of London.

SEPARATION AGREEMENTS AND NATIONAL ASSISTANCE

IN a previous article¹ the writer discussed the liability to maintain one's spouse and children now imposed by the National Assistance Act, 1948, s. 42, and the enforcement of this liability by the National Assistance Board under section 43, both of which sections were found to have roots deep in the earlier poor law. The object of the present article is to explore the relation of this liability for the purposes of national assistance to that general common law liability of a husband to maintain his wife, which she may today enforce either by pledging his credit or by the more effective statutory remedy of obtaining an order for a regular money payment from the justices or the High Court on the ground of wilful neglect to maintain her. In particular, it is proposed to examine the defences which have protected the husband from having such an order made against him and to consider their validity in releasing him from his liability under section 42. For in recent cases there has been the suggestion that the two liabilities remain to some extent distinct and that what may be a defence to the one is not necessarily a defence to the other.

Of these cases the latest are *Stropher v. National Assistance Board*² and *National Assistance Board v. Parkes*,³ in which the important issue was the effect of a consensual separation on the husband's liability under section 42 for his wife's maintenance. They were heard together before the Divisional Court of the Queen's Bench Division, *Parkes'* case being subsequently affirmed by the Court of Appeal.⁴ Decided since the previous article, these cases develop significantly the earlier decisions on this section in *National Assistance Board v. Wilkinson*⁵ and *National Assistance Board v. Prisk*,⁶ which were there discussed; *Parkes'* case also makes a far-reaching extension of the principle in *Tulip v. Tulip*⁶ concerning the ineffectiveness of separation agreements to oust the jurisdiction of the court in matters of maintenance.

All the four cases on national assistance came before the Divisional Court as cases stated from justices, to whom the National Assistance Board had applied by complaint for an order against the husband under section 43 of the Act of 1948, which, it will be remembered, enables the Board to recover a contribution

¹ (1955) 18 M.L.R. pp. 110-119.

² [1955] 1 Q.B. 486; [1955] 1 All E.R. 700.

³ [1955] 2 Q.B. 506; [1955] 3 All E.R. 1.

⁴ [1952] 2 Q.B. 648; [1952] 2 All E.R. 255.

⁵ [1954] 1 W.L.R. 443; [1954] 1 All E.R. 400.

⁶ [1951] P. 378; [1951] 2 All E.R. 91.

towards past or future assistance from the relative made primarily liable for the maintenance of the assisted person under section 42.

In *Stropher's* and *Parkes'* cases the basic facts were the same: a consensual separation; the receipt of national assistance by the wife; a complaint brought by the Board against the husband as the relative liable under section 42; an appeal by way of case stated against the justices' decision.

In *Stropher's* case the justices found that the separation agreement contained no express or implied provision for the husband to maintain the wife. An application by the wife in 1951 for a maintenance order on the ground of desertion and wilful neglect to maintain her had been dismissed by the justices. Since June, 1954, she had been obliged to resort for assistance to the Board, on whose application the justices now made an order under section 43 for the husband to pay 10s. a week to the Board towards the wife's maintenance.

The Divisional Court (Lord Goddard C.J., Ormerod and Gorman JJ.) dismissed the husband's appeal. The learned Lord Chief Justice in his judgment pointed out that the wife had not committed any matrimonial offence so as to forfeit her right to be maintained by her husband. In *Wilkinson's* case the wife was in a state of desertion: "That case decided no more than that a husband is under no liability to support his wife if she has been guilty of a matrimonial offence. If she has committed adultery or remains in a state of desertion, the husband is not bound to support her, and, therefore, the National Assistance Board, if they support her, cannot recover from the husband."⁷ In the present case the husband's liability to maintain his wife continued despite the consensual separation. Cases in the Probate, Divorce and Admiralty Division⁸ put forward by counsel for the husband only established that a consensual separation without any agreement for the maintenance of the wife deprived her of her right to seek relief under the Summary Jurisdiction Acts,⁹ for the husband could not be guilty of wilful neglect to maintain his wife if they separated on the terms that he would not maintain her.¹⁰ Apart from these Acts the wife could not ask the court for a sum of money: at common law her only remedy was one of self-help—the right to pledge her husband's credit for necessities. If however the wife had to seek assistance from the National Assistance Board, then the husband could be made to contribute

⁷ [1955] 1 Q.B. 486 at 496; cf. slightly different wording in the *All England Reports* at 706.

⁸ *Baker v. Baker* (1949) 66 (pt. 1) T.L.R. 81; *Stringer v. Stringer* [1952] P. 171; [1952] 1 All E.R. 373; and *Tulip v. Tulip* (above): these cases are discussed below.

⁹ And equally, although his Lordship does not mention this, under Matrimonial Causes Act, 1950, s. 23, replacing Law Reform (Miscellaneous Provisions) Act, 1949; *Tulip v. Tulip* is itself a case on this section.

¹⁰ It will be shown later that this statement of the law must now be considered doubtful in view of the observations of the Court of Appeal in *Parkes'* case.

towards this assistance, for his statutory liability under section 42 continued so long as there was no matrimonial offence on her part.

The learned Lord Chief Justice disposed of *Parkes'* case in the same judgment. In that case the separation not only contained no provision for maintenance but also embodied a covenant by the wife not to claim any financial provision from the husband in respect of herself. She later became in need of, and received, national assistance. The Board then sought a justices' order against the husband under section 43. The Board appealed against the dismissal of its complaint.

The Divisional Court allowed the appeal. *Prisk's* case was directly in point, for (as his Lordship asked¹¹) what difference was there between an agreement to pay an inadequate amount, as in *Prisk's* case, and an agreement to pay nothing at all? Accordingly *Parkes'* case was sent back to the justices for them to decide what was a proper sum to be paid by the husband under section 43 of the Act of 1948.

The decision of the Divisional Court was upheld by the Court of Appeal, where the judgments of Denning, Birkett and Romer L.JJ. are of particular importance regarding the effect of a separation agreement on the husband's liability. These judgments, however, can best be discussed at a later stage of this article, since it is proposed to treat first the position where some matrimonial misconduct by the wife is in question, and then to return to the problems raised by a consensual separation.

EFFECT OF WIFE'S MATRIMONIAL MISCONDUCT UPON HUSBAND'S LIABILITY

In *Stropher's* and *Parkes'* cases we have already seen that the Lord Chief Justice in the Divisional Court considered that the husband's liability under section 42 might be terminated by a "matrimonial offence" on the part of the wife. He also added some valuable observations upon the expression "all the circumstances" in section 43 (2), by reference to which the justices are to assess what is an appropriate amount for the husband to pay. His Lordship suggests¹² that the justices may go beyond a consideration of the husband's means: "There may be other cases in which the justices come to the conclusion that, if the wife were to act more reasonably, the parties might come together, and there again, the justices might think that in all the circumstances of the case it would not be right to make the husband pay a proportion of his income to his wife because they might think that the wife was a good deal more to blame for the state of affairs than her husband."

¹¹ At 498.

¹² At 498.

These observations recall the reasoning of the justices in *Wilkinson's* case,¹³ although on appeal the Divisional Court was able to dispose of that case on another ground. For the justices there argued (*inter alia*) that section 43 (2) did allow them, in deciding whether, and for what amount, to make an order, to take into consideration as one of the circumstances the matrimonial conduct of the wife. This view appears to find approval in his Lordship's remarks just cited. It would therefore follow that, even where the statutory liability is not excluded by any "matrimonial offence" of the wife, yet there may be circumstances (including her matrimonial conduct) which would justify the justices making no order under section 43. In other words, in the presence of a matrimonial offence the statutory liability is excluded and no order is possible; in any other case the justices have a discretion whether or not to make an order, in the light of "all the circumstances."

This at once raises a difficulty. What is meant by a "matrimonial offence"? His Lordship does not tell us. Certainly it is not a term of art, and its meaning in the present context can best be illustrated by an examination of the case-law on those other statutory provisions which have dealt with the husband's liability to maintain his wife, namely, section 3 of the Vagrancy Act, 1824 (now replaced by section 51 of the National Assistance Act, 1948), which imposed criminal responsibility for wilful neglect to maintain one's wife and family, section 4 of the Summary Jurisdiction (Married Women) Act, 1895, which gave to justices jurisdiction to make a maintenance order against a husband on the ground of his wilful neglect to provide her with reasonable maintenance, section 23 of the Matrimonial Causes Act, 1950, which gives the High Court jurisdiction to order periodical payments on the like ground, and section 33 of the Poor Law Amendment Act, 1868, which expanded a more limited provision in section 5 of the Poor Law Amendment Act, 1850, and is the statutory ancestor of section 43 of the Act of 1948 as enabling guardians of the poor to recover from a husband, not himself "on the parish," the cost of poor relief given to a married woman. For such matrimonial offences on the part of the wife as have been successfully pleaded by the husband under these sections are likely to be no less a defence to a complaint under section 43 of the Act of 1948.

R. v. Flintan,¹⁴ the usual starting-point, was concerned with a prosecution of a husband for wilful neglect to maintain his wife under section 3 of the Vagrancy Act, 1824. The husband's defence that his wife had committed adultery was successful, Littledale J. observing *obiter*¹⁵ that a wife having rendered herself unworthy

¹³ [1952] 2 Q.B. 648 at 651.

¹⁴ (1830) 1 B. & Ad. 227.

¹⁵ At 230.

of her husband's protection returned to the same state as if she were not married. This case was followed in *Culley v. Charman*¹⁶ where, under the Act of 1868, the guardians of the poor vainly tried to recover from the husband the cost of relief given to an adulterous wife. Statutory recognition of adultery as a defence, at least where not condoned, condoned, or connived at by the husband,¹⁷ was given by section 6 of the Act of 1895 which stated that no orders should be made under that Act on the application of a married woman who was proved to have committed adultery. A reasonable but mistaken belief in the wife's adultery is equated with adultery for this purpose: in *Morris v. Edmonds*¹⁸ a husband was held not guilty under section 3 of the Vagrancy Act, 1824, because of his bona fide belief that his wife had committed adultery. This decision was followed in the modern case of *Chilton v. Chilton*¹⁹ where a justices' maintenance order against the husband on the ground of wilful neglect to maintain his wife was not upheld on appeal, since she had deliberately induced in his mind a false belief in her adultery, in consequence whereof he had ceased to maintain or to cohabit with her: his liability to maintain her having ceased when he had reasonable belief that she had committed adultery, he could not be guilty of wilful neglect to maintain her and the justices had no ground to make the order. A later case,²⁰ however, has held that, upon a finding by the court that the wife has not committed adultery, the husband's liability is revived with effect from the date of such finding.

Desertion similarly relieves the husband from liability. A modern case is *Richardson v. Richardson*²¹ where the wife's continuing desertion deprived the justices of jurisdiction under the Act of 1895 to make an order on the husband on the ground of his wilful neglect to maintain her. But the husband's liability is only suspended for so long as the state of desertion continues: In *Jones v. Guardians of Newtown & Llanidloes*²² the guardians of the poor obtained an order for the husband to contribute towards the cost of maintaining his lunatic wife in an asylum under section 5 of the Poor Law Amendment Act, 1850, since the wife's *animus deserendi* was necessarily terminated by her lunacy. The desertion may be either actual or constructive: thus, in *Winnan v. Winnan*,²³ the wife's conduct in preferring her swarm of cats to her husband was held to amount to constructive desertion by the Divisional Court of the Probate, Divorce and Admiralty

¹⁶ (1881) 7 Q.B.D. 89.

¹⁷ See *Marczuk v. Marczuk* [1956] 1 All E.R. 657.

¹⁸ (1897) 77 L.T. 56.

¹⁹ [1952] P. 196. So also *Hartley v. Hartley* [1955] 1 All E.R. 625.

²⁰ *West v. West* [1954] 2 All E.R. 505, a case upon Matrimonial Causes Act, 1950, s. 23.

²¹ (1942) 167 L.T. 260.

²² [1920] 3 K.B. 381.

²³ [1949] P. 174.

Division, which considered that the justices had been in error in making an order on the husband on the ground of wilful neglect to maintain her.

If, as these cases establish, adultery and desertion relieve the husband of his liability for his wife's maintenance, then cruelty of the wife towards him ought surely to have the same effect; no case exists on the point, although it is noteworthy that the justices expressly found that there was no cruelty by the wife in *Stropher's* case. It has been suggested²⁴ that conduct of the wife falling short of constructive desertion but giving the husband grave and weighty cause for leaving her (and her cruelty might be such a cause) has been established as a valid answer to an application for a maintenance order from the justices. The cases²⁵ cited in support of this contention do not, in the present writer's respectful submission, admit of so wide an interpretation.

The matrimonial offences so far discussed are essentially ones which would be grounds for divorce—adultery, desertion and cruelty. When we turn to circumstances (to adopt a more neutral term) which would found a nullity petition, we are on less sure ground. The usual distinction between a void and a voidable marriage would seem to be appropriate. In the presence of circumstances rendering the marriage void the court could hardly hold the husband under a duty to maintain a wife who, *ex hypothesi*, was no wife. In a voidable marriage the test to adopt might be that of the blameworthiness of the wife.²⁶ Thus, a husband would still be liable, criminally and civilly, to maintain a wife, despite her inability to consummate the marriage, so long as the marriage tie remained; but he would not be so liable where there had been wilful refusal to consummate on the wife's part. *Sed quare.*

Even where there is no specific matrimonial offence which would negative liability under section 42 of the Act of 1948, the Lord Chief Justice in *Stropher's* and *Parkes'* cases appears to have regarded the justices as still having a discretion under the terms of section 43 as to whether or not to impose an order on the husband. This view, expressed in the passage from his judgment previously cited,²⁷ finds support in the judgments of the learned Lords Justices of Appeal in *Parkes'* case. Their reasoning, however, is different. To the Lord Chief Justice matrimonial offences exclude the husband's liability under section 42, since this section must be read as importing impliedly the old common law defences, whereas the matrimonial conduct in general is a matter for consideration as forming part of "all the circumstances" mentioned

²⁴ Elaine Jones, "Wilful Neglect to Maintain" (1953), 103 L.J. 261.

²⁵ *Richardson v. Richardson*; *Winnan v. Winnan*; *Chilton v. Chilton*.

²⁶ A test advocated by the learned Lord Chief Justice as a guide for justices when deciding whether, and for what amount, to make an order under s. 43 of the Act of 1948: see [1955] 1 Q.B. 486 at 498 (quoted above at p. 625).

²⁷ At p. 625, above.

in section 43. On the other hand, the Court of Appeal took the view that section 42 imposed a liability absolute in its terms, but that section 43 then allowed the justices to take into account the matrimonial conduct of the wife, including specific offences such as adultery, in deciding whether to make an order. Thus, Denning L.J. considered²⁸ that the wording of section 43 allowed the court to have regard to any circumstances recognised by the law as sufficient to relieve a husband of his obligation to maintain his wife; "the decision in *National Assistance Board v. Wilkinson* was perfectly right in that the wife's guilt is one of the circumstances to which the magistrates must have regard. It is so strong a circumstance that it affords an answer in law to the claim." Romer L.J. put the point even more strongly²⁹: section 42, in his view, was absolute in its terms and the statutory liability there imposed rested upon a husband irrespective of his wife's desertion or adultery. "The clear effect of sections 42 and 43 is that the guardians [*sic*] can bring before the justices a married man whose marriage is still subsisting, but when he comes before the court, the circumstances which are referred to in subsection (2) of section 43 are brought into play, and as Denning L.J. has pointed out, a highly relevant circumstance—and, it may be, a conclusive circumstance—which would prevent the magistrates from making an order under section 43, would be the fact established by the husband—if it was established—that his wife had committed a matrimonial offence. I think one arrives at the conclusion at which the Divisional Court arrived in *Wilkinson's* case by bringing a husband whose wife has committed a matrimonial offence within the category of section 43 and then exempting him if such offence be established."

It is respectfully submitted that the Court of Appeal adopt the happier approach and one conforming with the normal canons of statutory interpretation. Instead of having to imply the old common law exceptions into section 42, the new statutory liability there created can be treated as an absolute one—as indeed on its face it appears; but the corresponding statutory remedy for its enforcement, namely, the order under section 43 at the complaint, and in favour, of the National Assistance Board, is a discretionary one under which the justices must have regard to all the circumstances, including factors which would have negatived the husband's common law liability.

Thus, the present state of the law concerning the effect of the wife's matrimonial misconduct upon the husband's liability for her maintenance may be summarised as follows—

- (1) A husband is liable to maintain his wife under the National Assistance Act, 1948, unless she is in a state of desertion (*Wilkinson's* case) or *a fortiori* has committed adultery

²⁸ [1955] 2 Q.B. 506 at 515.

²⁹ At 524.

(*Culley v. Charman*): these offences are a conclusive answer to a complaint under section 43.³⁰

- (2) What other matrimonial offences by the wife will relieve the husband of this liability remains to be decided, probably by analogy to decisions on wilful neglect to maintain under section 4 of the Summary Jurisdiction Act, 1895, section 23 of the Matrimonial Causes Act, 1950, and section 3 of the Vagrancy Act, 1824 (now section 51 of the Act of 1948). Besides adultery and actual desertion, constructive desertion by the wife and conduct by her such as to create a reasonable though mistaken belief in her adultery have both been held to negative the husband's liability on applications under the Act of 1895 (*Winnan v. Winnan*; *Chilton v. Chilton* and *Hartley v. Hartley*).
- (3) Even where there is no specific matrimonial offence, the justices still have a discretion whether, and for what amount, to make an order on the husband under section 43 (dicta of Lord Goddard C.J. in *Stropher's* and *Parkes'* cases, and of Denning, Birkett and Romer L.JJ. in the Court of Appeal in *Parkes'* case).

EFFECT OF CONSENSUAL SEPARATION UPON HUSBAND'S LIABILITY

Passing from the involuntary loss of the husband's protection because of a matrimonial offence to its voluntary surrender, we reach the separation cases. Here *Parkes'* case has revealed an interesting divergence of view between the Lord Chief Justice in the Divisional Court and Denning L.J. in the Court of Appeal.

Before *Parkes'* case the earlier cases were generally accepted as establishing that, where there was a consensual separation, the wife, in order to prove that her husband had been guilty of wilful neglect to provide her with reasonable maintenance, must show that the husband had accepted the liability, expressly or impliedly, and notwithstanding the separation, to continue to maintain her (*Baker v. Baker*³¹). Moreover, in *Stringer v. Stringer*,³² proof of consensual separation without any agreement by the parties regarding maintenance of the wife was held to rebut the common

³⁰ *Sed quare* effect of connivance, condonation or conduct conducing to the adultery. By analogy to Summary Jurisdiction Act, 1895, s. 6, these should prevent the husband from relying upon the adultery to negative his liability: see *Marczuk v. Marczuk* [1956] 1 All E.R. 657. These complications apart, it is to be noted that a finding of adultery or desertion is a conclusive answer in law and not merely a circumstance which the justices have a discretion to regard or disregard, when asked to make an order under section 43: Denning L.J. is emphatic in approving *Wilkinson's* case on this point.

³¹ (1949) 66 (Pt. 1) T.L.R. 81; followed in *Chapman v. Chapman* (unreported, April 4, 1951) and *Starkie v. Starkie* (No. 2) [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519, where (at 1522) Lord Merriman P. put the point succinctly: "The separation was consensual, and there was no agreement, express or implied, to maintain the wife. In my opinion, therefore, the finding of wilful neglect to provide reasonable maintenance for the wife cannot stand."

³² [1952] P. 171; [1952] 1 All E.R. 373.

law presumption of the husband's liability to maintain her, and to that extent the onus was on the wife to prove this liability to be still subsisting or to have been revived. On the other hand, provision for the wife in the separation agreement indicated that the husband had recognised his continuing liability; if then the agreed amount became inadequate for the wife's needs, the court might, despite the provision being faithfully carried out by the husband, hear an application from the wife for a maintenance order on the ground of wilful neglect to maintain her, either under section 4 of the Act of 1895 (*Morton v. Morton* (No. 1); *Dowell v. Dowell*³³) or under section 23 of the Matrimonial Causes Act, 1950 (*Tulip v. Tulip*). Nor in such a case did the usual covenant by the wife not to make any application to the court for maintenance exclude the inherent jurisdiction of the court (*Morton v. Morton* (No. 1); *Dowell v. Dowell*). But the existence of the agreement was, and (despite *Parkes'* case), it is submitted, still remains, weighty evidence of the reasonableness of the maintenance therein provided, so that the court ought not lightly to be asked to upset, or to go behind, the terms of an agreement freely entered into between the parties, even though it has power to do so: *Morton v. Morton* (No. 2),³⁴ where in the Court of Appeal Singleton L.J. uttered this warning: "It is to be remembered that the wife, who has obtained a measure of certainty under the terms of the agreement, may be in a very much better position than she would have been if she had not had the agreement. If a time comes when the husband has less means and he finds it difficult to pay the amount which he has undertaken to pay, he is still bound by the agreement."³⁵

In his judgment in *Stropher's* and *Parkes'* cases the Lord Chief Justice seems to have regarded the liability to maintain his wife placed on the husband by section 42 of the Act of 1948 as subject to the same defences as were open to the husband in resisting the wife's applications under section 4 of the Act of 1895 and section 23 of the Act of 1950, save in this one important respect: whereas the wife is prevented from subsequently applying to the court under the latter sections where the consensual separation includes no provision as to her maintenance by the husband, the absence of such provision is no bar to the National Assistance Board obtaining an order in its favour against the husband under section 43 of the Act of 1948. The lack of provision for the wife's maintenance indicates that she has abandoned her claims in this respect against her husband: it is therefore a bar *quoad* the wife, but not *quoad* the Board.³⁶ "She has made her bargain

³³ [1942] 1 All E.R. 273; [1952] 2 All E.R. 141.

³⁴ [1954] 2 All E.R. 248.

³⁵ At 254.

³⁶ Nor, presumably, *quoad* any child of the marriage: thus, in *Starkie v. Starkie* (No. 2) (above), where there was a consensual separation without any agreement as to the maintenance of the wife or the child, the Divisional Court

and she cannot take advantage of the provisions of these statutes, and her only remedy is to go to the National Assistance Board. If the Board, coming to the conclusion that she is destitute, relieve her, then, even though the husband could not be made to pay under the Summary Jurisdiction Acts, he would have to repay the Board under the National Assistance Act.”³⁷

In the Court of Appeal, Denning L.J., while agreeing with the Lord Chief Justice’s conclusion that the National Assistance Board has a remedy against the husband, takes a different view of the wife’s own rights against the husband. In his view three possible situations may arise under a separation agreement—

- (A) The husband promises to pay his wife a fixed sum which is sufficient for her maintenance in her then situation, having regard to her own earning capacity.
- (B) The agreement contains no provision for maintenance at all.
- (C) The husband fixes a deliberately insufficient sum, though he could well pay more, his intention being that she should resort to national assistance to relieve his own pocket.

In situation (A), by paying the agreed sum the husband fulfils his obligation to maintain his wife, but only so long as the facts remain as they were at the time of the agreement. If new circumstances arise under which she needs more and she brings these new facts to his notice and he has the means to pay more, then he is under a duty to increase the sum, notwithstanding the prior agreement. “If he does not pay her more according to her needs in the new situation, he is guilty of wilful neglect to maintain her: see *Tulip v. Tulip*, *Dowell v. Dowell*, *National Assistance Board v. Prisk*.”³⁸

In situation (B), so long as the existing circumstances continue, the husband is not under any obligation to pay any maintenance. But if new circumstances arise and these circumstances are brought to the husband’s notice and he has the means to pay, then he comes under a duty to maintain her, despite the prior agreement that he should pay nothing. “The principle of *Tulip v. Tulip*

upheld the justices’ order in respect of the child for 30s. a week (the maximum permitted in respect of a child under the Summary Jurisdiction Acts), but reduced the amount in respect of the wife herself from 20s. to a nominal 1s. In view of the terms of the separation there had only been wilful neglect to maintain the child, not the wife. Therefore, applying *Kinnane v. Kinnane* ([1953] 2 All E.R. 1144), the justices undoubtedly had jurisdiction to make the wife an order which included provision for herself as well as for the child, once wilful neglect to maintain the child had been proved; but (in the words of the headnote in *Starkie’s* case) “The court in assessing in its discretion the amount of any order in favour of the wife would consider her conduct; and in the circumstances of the present case, where the wife had failed to establish the complaints concerning herself, the proper order would be a nominal one, which might be varied later.” See also *National Assistance Board v. Mitchell* [1956] 1 Q.B. 53, discussed below.

³⁷ [1955] 1 Q.B. 486 at 499.

³⁸ [1955] 2 Q.B. 506 at 516.

applies, I think, just as much when there is an agreement to pay nothing as when a fixed sum is to be paid; and it overrides anything said previously in *Baker v. Baker* and *Chapman v. Chapman*. But so long as the husband is ignorant of the new situation he is under no such duty, and is not guilty of wilful neglect to maintain her. That is, I think, the effect of the decision in *Stringer v. Stringer*.”³⁹

In situation (C), even though there may be no new circumstances, nevertheless the husband remains liable to maintain her, despite the agreement, for “a husband cannot shift his responsibility on to the rest of the community in that way.”⁴⁰

These are, as one might expect of his Lordship, very far-reaching observations. In effect they introduce into every separation agreement an implied *rebus sic stantibus* proviso; indeed, situation (C) goes still further: the agreement becomes mere verbiage, at least in regard to the maintenance arrangement; and, if this goes, as his Lordship himself points out,⁴¹ then the rest of the agreement must fall with it, the separation itself will cease to be consensual, and the spouses will be at liberty, at worst to seek their respective remedies against each other, at best to proceed to a reconciliation.

Moreover, if his Lordship's view of *Tulip v. Tulip* is generally accepted (as it was by his brethren in the Court of Appeal), *Parkes*' case is likely to assist in the further eclipse of the formal maintenance or separation agreement.⁴² For the practitioner will now be all the more reluctant to advise separating spouses to enter into such agreements: rather, where she has some ground, the wife's adviser will counsel her to seek an immediate order which can later be varied as need arises (and an application for periodical payments under section 23 of the Act of 1950, be it noted, is not subject to the limits in amount set by the Summary Jurisdiction Acts), while the husband's adviser must warn his client that, whatever arrangement is made for maintenance, it is liable to be upset by the court, either immediately, if the maintenance is not commensurate with the wife's present needs (*i.e.*, situation (C) above), or in the future, if the present amount should later prove inadequate (*i.e.*, situation (B) above)—and in an era of inflation this is more than a likelihood. Furthermore, the husband must be warned that he will be held to the amount which he agrees to pay, even though his own financial position deteriorates or that of his wife improves. But a maintenance provision in a separation agreement will still presumably be of

³⁹ At 517.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² See note of O. M. Stone, (1956) 19 M.L.R. p. 92. The separation agreement is particularly dangerous for a spouse who may later wish to seek divorce on the ground of desertion: see generally L. J. Blom-Cooper, “Separation Agreements and Grounds for Divorce,” p. 638, below.

strong evidential value as to the reasonableness of that provision, as Singleton L.J. pointed out in *Morton v. Morton* (No. 2).⁴³

It can, of course, be argued that the observations of his Lordship are merely *obiter dicta*. The *ratio decidendi* of *Parkes'* case might be stated limitatively, thus: the National Assistance Board may proceed against the husband under section 43 irrespective of whether the wife is barred from her statutory remedy under the Summary Jurisdiction Acts by the terms of the consensual separation. It was on this restricted *ratio* that the Lord Chief Justice decided the case⁴⁴; and, admittedly, the judgments of Birkett and Romer L.JJ. in the Court of Appeal show that their minds were more directed to the possible rights of the National Assistance Board than to those of the wife herself,⁴⁵ although both expressed their full approval of Lord Justice Denning's judgment.

The conflict between the Lord Chief Justice and Denning L.J. centres on the interpretation of *Tulip v. Tulip*. In the view of the Lord Chief Justice, Mrs. Parkes "has made her bargain and she cannot take advantage of the provisions of these statutes."⁴⁶ For her *Tulip's* case is of no avail, since this delicate flower only raises its head in situation (A) and not in the circumstances of situation (B) in which she now finds herself. But in the sunshine of Lord Justice Denning's approval, *Tulip v. Tulip* is forced to bloom even in the very different climate of situation (B); indeed, it even survives the hothouse of situation (C).

A perusal of the earlier case-law and of *Tulip's* case itself lends support to the interpretation adopted by the Lord Chief Justice. So far as the wife is concerned (as distinct from the National Assistance Board), the cases draw a distinction between situation (A), where the husband has recognised his continuing liability for maintenance and proceeded to quantify it at an agreed figure, and situation (B), where both spouses tacitly acknowledge this liability to be at an end. In the former situation, as happened in *Tulip's* case,⁴⁷ the court is prepared to revise the agreed figure in the light of changed circumstances; in the latter, to make any

⁴³ In the passage cited above at p. 631.

⁴⁴ *Stropher v. National Assistance Board*, which the Lord Chief Justice disposed of in like manner in the same judgment, still stands as a decision based on this restricted *ratio*.

⁴⁵ Thus, *per* Birkett L.J. (at 523): "It would be most unjust, where the facts were that the wife was in need and somebody must maintain her and the National Assistance Board had stepped in because she was in need, if a husband could say: 'You cannot touch me because I had a private bargain that I should never be touched.' Where public money is expended in that way it would be quite wrong to say that a private bargain should overrule the right and power contained in the statute which provides that public money in appropriate circumstances should be recovered."

⁴⁶ [1955] 1 Q.B. 486 at 499 (more fully cited above at pp. 631-632).

⁴⁷ Following *Morton v. Morton* (No. 1) and followed in *Dowell v. Dowell*; see also *Price v. Price* [1951] P. 413 at 419 (*per* Denning L.J.).

maintenance order against the husband would be to stultify completely the private bargain, and this, until *Parkes*' case, the court declined to do.⁴⁸ Only in *Stringer v. Stringer* is there a strong suggestion that notice of changed circumstances might revive the husband's common law liability towards his wife which had been suspended by the consensual separation without any provision for her maintenance.

Situation (C)—the fixing of the maintenance *ab initio* at a nominal and inadequate figure—does not seem to have been discussed before in the cases, but on like reasoning the private bargain should prevent any intervention by the court, at least so long as circumstances remain as they were when the bargain was struck. If however circumstances change, since *some* liability is recognised, the court may revise the original figure.⁴⁹ But in this situation it seems that Denning L.J. would now allow the wife (then, *a fortiori*, the National Assistance Board) to obtain an order against the husband, even without any new circumstances arising.

Yet, whatever the previous authorities, it is submitted, with respect, that Lord Justice Denning's bolder interpretation of *Tulip*'s case is correct in principle and logically and practically desirable. In principle, although the courts should not lightly interfere with the parties' bargain, in matrimonial matters they have quite properly refused to be mesmerised by appeals to the sanctity of contract. *Hyman v. Hyman*,⁵⁰ though in a different context, was a strong expression of this refusal. *Tulip v. Tulip* carried it still further. *Parkes*' case is a logical development from that case. For, if, as in *Tulip v. Tulip*, *Morton v. Morton* (No. 1), *Dowell v. Dowell*, a stipulated but now inadequate amount can be varied by the court, why should not the court equally intervene where there is no provision at all or one which was inadequate from the outset? The bargain of the parties should be no more sacrosanct in the one case than in the other.

Moreover, the view of Denning L.J., in which his brethren

⁴⁸ Thus, *Johnston v. Sumner* (1858) 3 H. & N. 261 at 270 (*per* Pollock C.B.), where the principle was propounded that, once cohabitation had ceased, the wife could not pledge her husband's credit unless she could show a continuing authority to do so; *Eastland v. Burchell* (1878) 3 Q.B.D. 432, where it was held that a wife had no implied authority to pledge the husband's credit after a separation on terms containing no provision that he was to continue to maintain her; modern applications of this principle to her statutory remedy under the Summary Jurisdiction Acts are *Baker v. Baker*, *Chapman v. Chapman*, *Stringer v. Stringer*, *Starkie v. Starkie*: these cases are discussed above at pp. 630-631.

⁴⁹ Counsel for the husband in *Parkes*' case conceded that, once the husband has accepted an express or implied liability to maintain the wife after a consensual separation, the quantum in the deed or agreement does not bind the wife or the Board ([1955] 1 Q.B. 486 at 493); "In *Tulip*'s case the husband accepted the liability but attempted to cut down the quantum." ([1955] 2 Q.B. 506 at 512.)

⁵⁰ [1929] A.C. 601.

Birkett and Romer L.JJ. concurred, prevents an anomalous distinction from arising between the new liability of the husband under section 42 of the Act of 1948, which the National Assistance Board can enforce under section 43, and his older common law liability, which the wife can enforce by pledging his credit or (more effectively) by obtaining a money order under the Summary Jurisdiction Acts or the Matrimonial Causes Act, 1950. The Divisional Court in *Parkes*' case, as in *Stropher*'s case, was prepared to set aside the parties' bargain in favour of the Board, but not in favour of the wife: the husband's liability under section 42 could be enforced by the Board even when his common law liability could not be enforced by the wife. Now, however, the enlarged view of the principle in *Tulip v. Tulip* will allow the wife herself to seek her statutory remedy for wilful neglect to maintain her, whenever the Board can proceed against the husband under section 43.

As the Board's stated policy is to encourage the wife to pursue her own remedy, whenever possible, it is practically desirable that the wife's remedy should be co-extensive with that of the Board. The Court of Appeal has helped to make it so in *Parkes*' case. That instances may still arise, however, where the Board may have a remedy when the person primarily concerned has none, is illustrated by the Divisional Court's decision in *National Assistance Board v. Mitchell*.⁵¹ The court held that section 44 (2) of the Act of 1948 permitted the Board to make application for an affiliation order against the putative father at any time within three years after the Board had last given national assistance in respect of his illegitimate child, and that this was still the case, even though the child's mother was herself barred from applying for an affiliation order under section 3 of the Bastardy Laws Amendment Act, 1872, because more than twelve months had elapsed from the date of the child's birth and the putative father had not during that period made any payments towards its maintenance. As the learned Lord Chief Justice pointed out, "It has been held both by this court and the Court of Appeal in *National Assistance Board v. Parkes* that the right which is given to the Board under this Act to make these applications is a right which is independent of the mother's right. It is a right of their own."⁵²

In conclusion, it is to be hoped that the wider view of the force of *Parkes*' case will prevail. The law in this sphere is already complicated. This complexity is due to the liability to maintain a wife having passed through three stages. The old common law liability with its common law remedy of self-help by the wife pledging the husband's credit was reinforced in 1895 by the more effective statutory remedy of a court order for a money payment as maintenance. The Act of 1948, building on

⁵¹ [1956] 1 Q.B. 53.

⁵² At 56.

the old poor law, has added a new statutory liability to maintain both wife and children and conferred on a third party, the National Assistance Board, the right to enforce this liability by a money order in its favour. Wherever possible the wife's remedy to obtain an order should be co-extensive with the Board's remedy under section 43. Lord Justice Denning's view of *Tulip v. Tulip* helps to integrate these remedies, while that of the Lord Chief Justice would tend to keep them apart.⁵³ The judgments in the Court of Appeal in *Parkes'* case are therefore to be welcomed as sweeping away an anomalous distinction which the Divisional Court had been content to accept.

L. NEVILLE BROWN.*

⁵³ The absence of complete integration has been shown to result in a serious overlap of benefit where a husband defaults on a maintenance order: the wife may obtain national assistance and then later recover the arrears of maintenance from the husband (see Weeks, "Maintenance Orders and National Assistance" (1952) 116 J.P.J. 101).

* M.A., LL.B.(cantab): Dr. en Droit (Lyon); Lecturer in Comparative Law in the University of Birmingham.

SEPARATION AGREEMENTS AND GROUNDS FOR DIVORCE

I—DESERTION AND THE SEPARATION AGREEMENT

THE result produced by the existence of a separation agreement made between spouses, which has the effect of defeating a petition for divorce—even undefended—brought on the grounds of desertion,¹ is neatly illustrated by a decision of Gavan Duffy J. in *Eva v. Eva*² in the Supreme Court of Victoria.

In that case it was found as a fact that the husband had left the wife without her consent and with the intention of putting an end to the matrimonial relationship. The day before he left, however, the husband had executed an agreement with the wife whereby the husband had made financial provisions for the wife, Clause 2 of the deed including the following stipulation:—

“The husband and the wife shall not molest or annoy or in any way interfere with each other in respect of anything whatever nor shall either of them at any time during the continuance of the agreement require or by any means endeavour to compel the other to cohabit with him or her.”

The presence of this clause prevailed upon Gavan Duffy J. to reserve judgment in which he reluctantly rejected the petition.

It is a well-established principle of English law that a separation deed executed by a husband and wife containing the usual clause that the spouses agree thereafter to live separate and apart is consensual in nature and prevents desertion running³ so long as the deed remains effective.⁴ The rule will not apply if the deed

¹ Halsbury's *Laws of England*, 3rd ed. (1955) Vol. 12, pp. 251-253; Rayden on *Divorce*, 6th ed., p. 144; Latey on *Divorce*, 14th ed., pp. 119 *et seq.*; Phillips' *Practice of the Divorce Division*, 4th ed., pp. 23 *et seq.*; Eversley on *Domestic Relations*, 6th ed., pp. 279-280; Tolstoy on *Divorce*, 3rd ed., pp. 47-50; Warmington's *Divorce Law*, 2nd ed., p. 48; Hamawi, *Family Law*, p. 254; Joske, "Desertion Despite Deed of Separation," (1948) 22 *Australian Law Journal* 38; Ithel Davies, "Separation Agreements and Divorce," (1956) 106 *Law Journal* 247, Royal Commission on Marriage and Divorce, Report 1951-1955, Cmd. 9678. Para. 157, p. 50; see Kahn-Freund, "Divorce Law Reform?" p. 573, *ante*. The obtaining of a *ghet* (a Jewish Bill of Divorcement) which is not recognised as validly dissolving the marriage, operates as an agreement by one spouse that the other should live separate and apart and hence bars desertion running, *Joseph v. Joseph* [1953] 1 W.L.R. 1182.

² [1954] A.L.R. 190; [1954] V.L.R. 105; noted briefly in (1954) 28 *Australian Law Journal* 382.

³ Scottish law gives rise to no such difficulties. An agreement to separate (which is unenforceable and revocable at pleasure) is no defence to a petition for divorce by reason of desertion: *A.B. v. C.D.* (1853) 16 D. 111; *Mitchell v. Mitchell* (O.H.) 1931 S.L.T. 484.

⁴ If the deed has been repudiated or put an end to by both parties and one of them has manifested an intention to abandon the other desertion revives,

has never been acted upon and the parties have continued to cohabit after its execution,⁵ nor where the consent, usually the wife's, has been obtained by fraud or coercion.⁶ Apart from these minor exceptions the rule is absolute. There have, however, been attempts to contend that the deed to which the parties had put their signatures, whilst on the face of it an out-and-out separation agreement, was not consensual in nature.⁷ In the recent decision of the Court of Appeal in *Crabtree v. Crabtree*,⁸ it was unnecessary, in view of the court's finding, to discuss extrinsic matters pertaining to the deed. The decision in *Eva v. Eva* is, therefore, of particular interest to those common law countries where desertion for a statutory period preceding the petition is a ground for divorce.

Gavan Duffy J. in *Eva v. Eva* considered a similar, though by no means identical, clause in an agreement executed by the parties in an undefended petition which came before Pilcher J. in *Smith v. Smith*.⁹ *Crabtree's* case, however, was not cited to the court in *Eva*, mainly no doubt because that case did little more than construe particularly unusual words. The parties in *Crabtree*, who were married in 1944, entered into an agreement in 1948 at a time when the husband was clearly in desertion. The material words in the clause in the agreement recited:—

“The husband and wife having for some time past lived separate and apart . . . the husband agrees with the wife that he will during the joint lives of himself and his wife, if they shall so long live separate and apart from each other, pay. . . .”

The Court of Appeal (Denning and Hodson L.JJ.) held that the

Pardy v. Pardy [1939] P. 258. See generally Joske, *op. cit.*, where the English and Australian cases are fully discussed. The author's encomium for the decision in *Pardy v. Pardy* (*supra*) is well sustained.

⁵ *Cock v. Cock* (1864) 3 Sw. & Tr. 514; *Nott v. Nott* (1866) L.R. 1 P. & D. 251; *Parkinson v. Parkinson* (1869) L.R. 2 P. & D. 25.

⁶ *Crabb v. Crabb* (1868) L.R. 1 P. & D. 601; *Dagg v. Dagg* (1882) 7 P.D. 17; *Piper v. Piper* [1902] P. 198; *Adamson v. Adamson* (1907) 23 T.L.R. 434; *Terry v. Terry* (1915) 32 T.L.R. 167; *Holroyd v. Holroyd* (1920) 36 T.L.R. 479; *Matthews v. Matthews* [1932] P. 103. Incapability of ascertaining, or deception as to, the contents of the deed is needed to set aside the deed, *Gillman v. Gillman* (1946) 90 S.J. 105; *cf. L. v. L.* [1938] V.L.R. 33.

⁷ *Walsh v. Walsh* (1920) 122 L.T. 463; *Long of Wraxall (Lord) v. Long of Wraxall (Lady)* [1940] 4 All E.R. 230; *Smith v. Smith* [1945] 2 All E.R. 452; *Smith v. Smith* (1948) 76 C.L.R. 525; *White v. White* [1950] S.A.S.R. 186; *Ellis v. Ellis* [1950] Q.W.N. 44; *Crabtree v. Crabtree* [1953] 1 W.L.R. 708; *O'Keefe v. O'Keefe* [1953] Q.W.N. 21; *Eva v. Eva* [1954] A.L.R. 190.

⁸ [1953] 1 W.L.R. 708; [1953] 2 All E.R. 56; briefly noted in 16 M.L.R. (1953) 514. The objection to the recital of the words “mutually agreed to separate” by Ithel Davies, *op. cit.*, overlooks this decision.

⁹ [1945] 2 All E.R. 452; reported also in minor reports the best of which is (1945) 61 T.L.R. 568 *sub nom. Smith C. A. v. Smith E. W.* Strangely the case is not to be found in the recent edition of Halsbury's *Laws of England*, *loc. cit.*, *supra*, note 1. Although a petition in undefended the court is bound to look at the deed as a possible bar to relief; see Hodson J. (as he then was) in *Watson v. Watson* [1938] P. 258 at pp. 260-261 distinguishing *Tress v. Tress* (1887) 12 P.D. 128; see also *Walsh v. Walsh* [1925] 2 D.L.R. 794 (Can.).

agreement only recited the fact that the parties *were* separated. It did not bind the parties to continue to live separate and apart but merely defined the duration of the payments of maintenance; hence it did not prevent desertion from running. Both judgments, however, as did that of Gavan Duffy J. in *Eva v. Eva*, and Pilcher J. in *Smith v. Smith*, quoted the classic judgment of Greene M.R. in *Long of Wraxall (Lord) v. Long of Wraxall (Lady)* to this effect: "It appeared from the evidence of the appellant that the real purpose of the separation deed was, in the minds of both parties, to regulate the financial position and to make provision with regard to the child. If the deed had been confined to these matters, no difficulty would have arisen."¹⁰

Gavan Duffy J. found it necessary in *Eva v. Eva* to construe separately the two limbs of the clause in the agreement, *i.e.*, the non-molestation clause and the non-cohabitation clause. In this, he derived much assistance from Pilcher J.'s decision in *Smith v. Smith*.¹¹ In that case, a wife's undefended petition, the parties were married in 1931; the husband left the matrimonial home in 1941 and until 1942 paid the wife an allowance. In January, 1942, the husband, through his solicitors, attempted to induce the wife to sign a separation agreement in the usual form containing a clause whereby the husband and wife agreed to live separate and apart. The wife was unwilling to sign the agreement but eventually the draft agreement was signed after the exclusion of that part relating to the agreement to live separate and apart. The agreement in its final form recited that it was the desire of the husband to live separate and apart, the remainder of the deed being concerned with the amount of the maintenance to be paid. It is apparent, although it can only be inferentially gleaned from the judgment, that the recitation of the desire to continue to live separate and apart was unilateral on the part of the husband. It will be necessary hereafter to consider the effect of these circumstances. Clause 7 of the agreement, however, presented further difficulty. The clause read:—

"Neither the husband nor the wife shall molest, annoy or interfere with the other or any member of their respective families or any of their respective friends and neither shall the husband nor the wife institute any proceedings for a restitution of conjugal rights."

¹⁰ [1940] 4 All E.R. 230 at p. 233. Whilst it is possible to establish that the deed is confined to matters of maintenance, it is apparently irrelevant that either spouse thought it was only a maintenance agreement if in fact it was a separation agreement, *Hamilton v. Hamilton* [1937] S.A.S.R. 163; *Shurven v. Shurven* [1943] S.A.S.R. 52 where the mistake as to the nature of the deed was brought about by the solicitor advising at the time that there would be no bar to a future divorce; see notes 20 and 30, *infra*.

¹¹ [1945] 2 All E.R. 452 followed by Mack J. in *Ellis v. Ellis* [1950] Q.W.N. 44.

(a) NON-MOLESTATION CLAUSE

In the absence of any evidence to the contrary, the presence of a non-molestation clause would appear to be conclusive against the agreement being anything but a consensual agreement to live separate and apart. Pilcher J. in *Smith v. Smith*, however, found it possible on the evidence by the wife to conclude that the non-molestation clause was in no way inconsistent with the wife's expressed wish that her husband should return or to afford the husband any excuse for continuing to refuse to return. The evidence in that case was that the wife had expressed the desire for the husband to return and, moreover, the agreement was only signed after considerable unwillingness on her part. The unilateral desire on the part of the husband to live separate and apart appeared conclusive in favour of the wife's contention that she was not a party to any such consensual separation. In the absence of such evidence, however, the effect of a non-molestation clause seems insuperable.¹²

In *Eva v. Eva*, the extrinsic evidence adduced on behalf of the wife was of a wholly different character. The nature of the evidence was purely negative (in *Smith* the husband's unilateral desire for separation expressed in the deed was cogent and positive evidence in favour of the wife) in that Gavan Duffy J. found that the wife did not agree to the termination of the matrimonial relationship. On this point he was able to rely on *Smith v. Smith*¹³ decided by the High Court of Australia where the majority¹⁴ had reversed a decision of Gavan Duffy J. himself. In that case the evidence was much simpler, and it was stated that if the wife and not the husband had left the matrimonial home, the husband would, owing to his conduct, nevertheless have been held to be the deserting spouse. Dixon J. (as he then was),¹⁵ delivering the majority judgment, held that the "non-molestation" clause, which was contained in the agreement executed *before* the husband left the matrimonial home, only tended to secure to the wife immunity from the possible persistent and violent attentions of the husband and "not for the purpose of terminating with her consent a matrimonial relationship." Latham C.J.,¹⁶ delivering the dissenting judgment, could not see his way to any other interpretation than that this was a separation agreement.

These decisions give rise to two questions. The first is whether and to what extent is extrinsic evidence admissible

¹² See Scott L.J. in *Tickler v. Tickler* [1943] 1 All E.R. 57 at p. 59 where extrinsic evidence was adduced concerning a non-molestation clause in a compromise agreement endorsed on counsel's brief on a settlement of proceedings in the King's Bench Division; this agreement was held not to be a bar to desertion.

¹³ (1948) 76 C.L.R. 525.

¹⁴ Dixon, Starke and Williams JJ., Latham C.J. and McTiernan J. dissenting.

¹⁵ At p. 528.

¹⁶ At p. 527.

to vary the terms of the deed.¹⁷ The only reference to the question as to the admissibility of evidence appears in *Long of Wraxall (Lord) v. Long of Wraxall (Lady)*.¹⁸ Rather confusingly, the editorial note¹⁹ states: "In the present case it is held that full proof of the necessary state of mind [*sic*] cannot rebut an agreement under seal to live separate and apart. . . ." From the judgment of Greene M.R. it appears that any evidence concerning the deed is admissible but the court will disregard the petitioner's misapprehension as to its effect.²⁰ This would not preclude evidence as to the surrounding circumstances pertaining to the nature of the agreement to separate and indeed in the English *Smith v. Smith* and the Australian cases evidence was so admitted. It is true that in all these cases the respondent did not appear²¹ and it may be that in the future the courts will have specifically to adjudicate upon this point.

A second matter appears highly pertinent although none of the decisions has expressly considered the matter. In both the Australian cases the execution of the deed preceded the moment when desertion commenced to run; whereas in the three English decisions the deeds so executed followed varying periods of desertion. In the former class of case desertion never takes place; in the latter desertion ceases to run. It is, however, not on this point that the main interest lies. The position of the parties at the two points of time vary and the nature of the evidence required to rebut a presumption of consensual separation will differ. Thus it was possible, in view of the husband's treatment of his wife, for Dixon J. in the Australian *Smith v. Smith* to say that the evidence showed that the wife agreed to a non-molestation clause purely in order to protect herself. There is much force in this argument; but if the position is such that the wife requires protection, should not her correct procedure be to petition for divorce or judicial separation on the grounds of cruelty?²² A separation agreement in terms similar to clause 7 of the agreement in *Smith v. Smith* before Pilcher J. will not be a bar to the proceedings on the grounds of cruelty²³ even if the act or acts

¹⁷ Phipson on *Evidence* (9th ed., 1952) gives no authority dealing with this type of agreement but it would appear that it would come within the exception as being admissible as disclosing the true nature of the transaction.

¹⁸ [1940] 4 All E.R. 230.

¹⁹ At p. 231.

²⁰ At p. 234; see particularly on this point, *Shurven v. Shurven* [1943] S.A.S.R. 52 and notes 10 *supra* and 30 *infra*.

²¹ Neither did he in *Crabtree v. Crabtree* [1953] 1 W.L.R. 708, although he was represented on the appeal only, it appears, on the issue as to the costs of the appeal (p. 709). There did not, however, appear to be any evidence required in connection with the terms of the clause in that case.

²² Presumably, as the court found that she had required protection, acts of violence were proved to have been committed; coupled with the *factum* of desertion this would be sufficient to establish cruelty as a ground for divorce.

²³ *Keeble v. Keeble* [1956] 1 W.L.R. 94; [1956] 1 All E.R. 100. In this case the common form of separation agreement concluded by stating that the parties should not institute proceedings for restitution of conjugal rights "or

complained of occurred during the period of the separation under the agreement.²⁴ But it may have been thought necessary to insert such a non-cohabitation clause because of the present state of the law relating to cruelty under which there may be acts of violence which yet fall short of legal cruelty sufficient for a decree of divorce.

The non-molestation clause is irrelevant in this connection; it is respectfully submitted that the view of the dissenting judges in the Australian *Smith v. Smith*, undesirable as the result may be, is to be preferred.

Where the deed post-dates the termination of the marital relationship, the view expressed by Dixon J. appears even less tenable. The possibility of molestation can never be as real a fear as where the husband is still living under the matrimonial roof. Pilcher J.'s decision, therefore, can only be supported on the particular facts of that case whilst Gavan Duffy J.'s recent pronouncement in *Eva v. Eva* was contrary to his earlier view in *Smith v. Smith* in which he was reversed; he did appear, however, only too willing to jettison his original view on this aspect of the case in favour of the majority decision in the High Court of Australia on the not unnatural ground that the adoption of such a view produced a more just result.

(b) NON-COHABITATION CLAUSE

Considering the second limb of the clause with regard to the agreement not to "require or *by any means* endeavour to compel the other to cohabit with him or her," Gavan Duffy J. in *Eva v. Eva*²⁵ again considered the similar wording in the case before Pilcher J., the wording in that instance being an agreement not to "institute any proceedings for a restitution of conjugal rights."

otherwise." Mr. Commissioner Latey Q.C., held that the words "or otherwise" were to be interpreted *ejusdem generis* and therefore limited to proceedings in which one spouse sought the court's aid in enforcing cohabitation. This reading of the clause was reinforced by a subsequent clause specifically contemplating the possibility of divorce proceedings.

²⁴ *Britt v. Britt* [1955] 1 W.L.R. 1272; [1955] 3 All E.R. 769 where the Court of Appeal disapproved of a passage in Rayden, *op. cit.*, p. 523 based on a dictum of Lord Merrivale P. in *Simcock v. Simcock* [1932] P. 94 at p. 96 to the effect that acts of cruelty after cohabitation has ceased may be taken into account only if they are within the ambit of the marital relationship. In allowing the appeal from a commissioner who applied the passage cited, the court noted also a case, *Kunski v. Kunski & Josephs* (1907) 23 T.L.R. 615 before Bucknill J. who granted a decree of judicial separation on the grounds of cruelty, the acts of cruelty having been committed during the currency of a separation agreement. It did not matter whether the cruelty took place while they were living together or while they were living apart. The court had simply to inquire whether the husband had treated his wife with cruelty. In *Britt*, Hodson L.J. (at p. 1275) explained the dictum on the basis that Lord Merrivale was dealing specifically with a case of persistent cruelty in the Summary Jurisdiction Acts, 1895-1945, and Morris L.J. (at p. 1275) noted that the passage in Rayden appeared under the rubric of "Persistent Cruelty" in the part dealing with the Summary Jurisdiction Acts. Denning L.J. was silent as to an explanation of the dictum.

²⁵ [1954] A.L.R. 190 at p. 191.

Had the words "by any means" been confined to legal means, Gavan Duffy J. would have gladly adopted the view put forward by Pilcher J. that this was no bar to a decree on the grounds of desertion. It was apparent, however, that the means of enforcing cohabitation were not confined to legal proceedings as it would be possible to effect such a reunion by way of family or financial pressure or by way of public opinion. There was, moreover, no escape from the conclusion that the wife had impliedly consented to the separation by the use of the word "require" and, as Gavan Duffy J. noted,²⁶ it was easier to find consent to separate here than in *Smith v. Smith* before Pilcher J. With respect, there appears to be no gainsaying this view. Had the clause been concerned with the contracting away of the spouse's right to a suit for the restitution of conjugal rights Gavan Duffy J. would have accepted Pilcher J.'s finding.

Pilcher J., curiously enough, regarded this clause as a severer obstacle than the non-molestation clause. To ally this contracting away of a right with the agreement to separate overlooks the duty of a deserted spouse. It is no part of the deserted spouse's duty to embark upon proceedings for restitution of conjugal rights in order to indicate a willingness to receive the deserting spouse back or demonstrate in a negative way that he or she is not consenting to the desertion. The deserted spouse, at the effluxion of the statutory period of desertion, is entitled to commence proceedings for a divorce without the intermediary step of a suit for the restitution of conjugal rights. Pilcher J. arrived at the conclusion that this limb of the clause in the agreement was no bar to desertion running. He adopted the dictum of Sir James Hannen P. in *Marshall v. Marshall*²⁷ that suits for restitution of conjugal rights, far from being in truth and in fact what theoretically they purport to be, are proceedings not for the purpose of insisting on the fulfilment of the obligations of married persons to live together, but are instituted for no "other purpose than to enforce a money demand." The use to which this dictum was put can only be regarded as ingenuous because the proceedings have, since 1879, changed in character. Maintenance can now be obtained by far simpler methods.²⁸ Moreover, the petitioner must now prove his or her sincere desire for a real restitution of conjugal rights and the willingness to render them to the respondent.²⁹

²⁶ At p. 192.

²⁷ (1879) 5 P.D. 19 at p. 23. The ulterior motive of restitution proceedings cannot prevent the granting of a decree as is exemplified in the law in New Zealand. See footnote 29 and 40th day, *Minutes of Evidence*, p. 965. Q. 9372-9373 (Finlay J.).

²⁸ Under the Summary Jurisdiction Acts, 1895-1949 up to £5 and under section 23 of the Matrimonial Causes Act, 1950 (introduced in the legislation of 1949) in unlimited amounts on application to the High Court.

²⁹ *Williams v. Williams* [1921] P. 131; *Mann v. Mann* [1922] P. 238; *Palmer v. Palmer* [1923] P. 180; *Lacey v. Lacey* (1931) 47 T.L.R. 577; *Macleod v. Macleod* [1955] 1 D.L.R. 374 (Can.).

The decree of restitution of conjugal rights has had a turbulent history

Regardless of this criticism of Pilcher J.'s judgment, such a clause in an agreement is still, in the absence of evidence to the contrary, a danger to the petitioner. The fact, moreover, that restitution proceedings are not the only means of enforcing the right to cohabitation and that therefore the agreement not to institute such proceedings is not necessarily evidence of a consensual agreement to separate, is manifest from the Australian decision in *Eva v. Eva*. Enough has been said to indicate that desertion proceedings are fraught with pitfalls whenever a separation agreement appears on the scene.

(c) CONCLUSIONS

In all the cases where the petition was refused, there was an overwhelming sympathy for the unsuccessful petitioner. The difficulties seem to occur in the relationship between the client and his/her legal advisers. Either the client does not fully appreciate the nature of the agreement entered into, or the question of further and future rights in divorce proceedings is passed over unexplained. The result in many cases is disastrous, for, as Greene M.R. pointed out in the *Long* case,³⁰ "The appellant, moreover, understood the advice given to him by his legal advisers as meaning that the execution of the deed in the form which it actually took would not prevent him from obtaining a dissolution should he at any time desire to do so. In this belief he executed the deed, and, as we have already said, the result is one of great hardship."

Little in the way of help from the courts can be achieved to alleviate this genuine hardship. The key to the avoidance of these results lies in the hands of those advising at the time of executing the deed. What the courts can do is to scrutinise any such deed which is executed contemporaneously with the spouse abandoning the matrimonial home by admitting any evidence touching upon

in the divorce laws of New Zealand. The failure to obtain a decree created the right of a petitioner forthwith to petition for divorce. This rule, established in 1898, removed in 1907, restored in 1920, was again revised by s. 8 of the Divorce and Matrimonial Causes Amendment Act, 1953, whereby the failure to obey the decree must continue for three years or more before a petition may successfully be presented. See *Minutes of Evidence*, 40th day before the Royal Commission given by Mr. Justice Finlay. At para. 9372, p. 965 the learned judge expressed the view that the rule was calamitous. (The rule was revised after the hearing before the Commission.) Mr. Justice Finlay cites, *loc. cit.*, a comment in a case at the turn of the century when Edwards J. said to counsel: "All right, now go on with the farce." See also paragraph 8 of Memorandum submitted by W. E. Leicester, 39th day, *Minutes of Evidence*, Royal Commission.

³⁰ [1940] 4 All E.R. 230 at pp. 233-234. See *Shurven v. Shurven* [1943] S.A.S.R. 52 where incorrect advice was given by a solicitor which proved fatal to a subsequent petition; see notes 10 and 20 *supra*. The decision in *Clark v. Clark* (No. 2) [1939] P. 257 provides a further example of the harsh results produced; similarly, *O'Keefe v. O'Keefe* [1953] Q.W.N. 21; *Gillman v. Gillman* (1946) 90 S.J. 105; *cf. Gibson v. Gibson* (1956) *The Times*, July 18, where Denning L.J. pointedly noted that there the maintenance agreement contained no separation clause.

the circumstances prior to its execution and evidence of the matrimonial situation at its execution; in the case of post-abandonment agreements, similarly to regard them with suspicion. Only in clear cases should these agreements, which are generally executed with the prime intention of making financial provision for the wife and children,³¹ be construed simply as agreements to live separate and apart and thus prevent desertion running.

Much more could be done by way of legislation in this type of case by a substantial reduction in the requisite period of desertion.³² A one-year period for desertion would exclude the majority of post-abandonment agreements and substantially reduce the number of agreements made contemporaneously with the spouse leaving the matrimonial home. In the latter case a one-year waiting period would preclude in a large number of cases the need of a wife to obtain maintenance by agreement, such need producing the most fruitful source for the separation agreement.³³

³¹ The recent developments in the courts relating to the inability of spouses to oust the jurisdiction of the courts with regard to maintenance and the independent right of the National Assistance Board under section 43 of the National Assistance Act, 1948, to recoup from the husband contributions paid to the wife may have weakened the desire for spouses to regulate their financial obligations by way of the separation agreement. See L. Neville Brown, "Separation Agreements and National Assistance," p. 623, *ante*. It has been suggested that now that the element of immutability has disappeared the present popularity of the separation agreement will diminish, 18 M.L.R. (1955) 92, and p. 623, *ante*. There is some suggestion that the increase in amounts to realistic levels under the Summary Jurisdiction Acts, 1895-1949, and *a fortiori* s. 23 of the M.C.A., 1950, has diminished the usefulness of the separation agreement, for which there is some support, *Gibson v. Gibson* (1956) *The Times*, July 18.

While the prevalence of the separation agreement may be on the wane, spouses who are separating will more often than not wish to regulate their financial positions by way of agreement without invoking the aid of the courts or contracting with one eye on future resort to the courts. A deed no doubt facilitates the computation of tax.

It must also be remembered that the attempted ouster of jurisdiction is severable from the remainder of the agreement and that payments of maintenance under an agreement can be enforced, *Goodinson v. Goodinson* [1954] 2 Q.B. 118.

For the interaction of a separation agreement and the court's powers under s. 23 of the Matrimonial Causes Act, 1950, see L. Neville Brown, *op. cit.*

³² There are of course instances where the separation agreement is specifically brought into existence for the purpose of allowing one spouse to leave the matrimonial home thereby terminating what the departing spouse may have considered an intolerable situation; such a situation may or may not give rise to grounds for divorce based on cruelty, *Keeble v. Keeble* [1956] 1 W.L.R. 94 at pp. 95 and 97. Clearly though, no petition on the grounds of desertion by either spouse could be entertained in such a case.

³³ A two-year period is recommended in the Australian draft for a Uniform Divorce Law, 29 *Australian Law Journal* 55.

The only concession to the present rule recommended by all the members of the Royal Commission, paragraph 158, p. 50, is that a separation agreement entered into before October 1, 1937, the date upon which desertion under the 1937 Act became a ground for divorce, shall not operate to bar a petitioner successfully obtaining a decree on the grounds of the respondent's desertion.

Fourteen members out of the nineteen recommended a ground of divorce constituted by two periods of desertion which together amount to at least three years within a period of three years and one month immediately before the presentation of the petition, paragraphs 149-150, pp. 46-47.

Whilst stating compendiously the rule as to the effect of separation agreements upon petitions for divorce on the grounds of desertion, the Royal Commission's Report³⁴ curiously goes on to say³⁵: "We have had no evidence of any general dissatisfaction with the existing law in England, . . ." at the same time recognising that³⁶ "terms making financial provision for the wife [and children] are usually included in a separation agreement." A realisation of the existing position might have led the Commission to examine more closely consensual and *de facto* separations as new grounds for divorce. In turn a greater regard might have been paid to the New Zealand legislation which was only fleetingly adverted to³⁷ despite the detailed evidence supplied to the Commission³⁸ and which it is now proposed to examine.

II—DE FACTO AND CONSENSUAL SEPARATION IN NEW ZEALAND DIVORCE LAW

New Zealand law³⁹ had as long ago as 1920⁴⁰ introduced consensual or judicial⁴¹ separation as a ground for divorce, but not

³⁴ Para. 157, p. 50.

³⁵ Para. 721, p. 192.

³⁶ Para. 722, p. 192.

³⁷ Para. 69 (xxvi) and (xxvii), p. 19 and para. 70 (vi) and (vii), pp. 26–27.

³⁸ *Minutes of Evidence*, 39th day, April 22, 1953, W. E. Leicester, Esq., pp. 952–963 and 40th day, July 14, 1953, Mr. Justice Finlay, pp. 963–968.

³⁹ *Sim's Divorce Law and Practice in New Zealand*, 6th ed., 1954.

⁴⁰ S. 4 of the Divorce and Matrimonial Causes Amendment Act, 1920, now, subject to minor verbal adjustments, section 10 (i) of the Divorce and Matrimonial Causes Act, 1928, provides for divorce on the grounds—

"That the petitioner and the respondent are parties to an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in full force for not less than three years."

See *Sim, op. cit.*, pp. 46–49.

Following the decisions in *Lodder v. Lodder* [1921] N.Z.L.R. 876 and *Mason v. Mason* [1921] N.Z.L.R. 955 the legislature intervened where the petitioner's wrongful conduct caused the separation and by an amending Act of 1921–1922 added a proviso which appears as section 18 of the principal (1928) Act and is equally applicable to the *de facto* separation divorce. The section provides—

"In every case where the ground on which relief is sought is one of those specified in paragraphs (h), (i), (j) and (jj) . . . and the petitioner has proved his or her case, the court shall have a discretion as to whether or not a decree shall be made; but if upon the hearing of the petition . . . the respondent opposes the making of the decree, and it is proved to the satisfaction of the court that the separation was due to the wrongful act or conduct of the petitioner, the court shall dismiss the petition."

See *Hargreaves v. Hargreaves* [1921] N.Z.L.R. 864; *Dobbs v. Dobbs* [1921] N.Z.L.R. 562; *Holloway v. Holloway* [1921] N.Z.L.R. 920; *Donnelly v. Donnelly* [1922] N.Z.L.R. 625; *Schlager v. Schlager* [1924] N.Z.L.R. 1011; *Boderick v. Boderick* [1926] N.Z.L.R. 159; *Andrews v. Andrews* [1922] N.Z.L.R. 753; *Reid v. Reid* [1923] N.Z.L.R. 213; *Keast v. Keast* [1934] N.Z.L.R. 316; *Davis v. Davis* [1950] N.Z.L.R. 115; *Crewes v. Crewes* [1954] N.Z.L.R. 1116; *Adams v. Adams* [1955] N.Z.L.R. 1245; *Marriott v. Marriott* [1956] N.Z.L.R. 125. See *Sim, op. cit.*, pp. 74–78.

In South Australia by section 3 of the Matrimonial Causes Act Amendment Act, 1938, amending section 6 of the principal Act, Matrimonial Causes Act,

⁴¹ This ground was also added in 1920; see now section 10 (f) of the 1928 Act.

until 1953⁴² did *de facto* separation become a ground. Whilst the period of such latter separation is of considerably longer duration—seven years as opposed to three years—its all-embracing character in including consensual and non-consensual separations gives it added significance in addition to its parallel to be found in the provisions of the English Matrimonial Causes Bill of 1950 which sought to provide grounds for divorce on the basis of seven years *de facto* or judicial separation.⁴³

The two prime requirements of a petition for divorce on the grounds of a *de facto* separation are (a) the existence of non-cohabitation which must be more than mere physical separation⁴⁴ and (b) that there is no likelihood of reconciliation which in turn

1929–1936 an order of judicial separation or an order granting relief from cohabitation which exists for a period of five years is a ground for divorce. See Joske, *Laws of Marriage and Divorce in Australia*, p. 266. The latest decision of the courts on this section is *Robilliard v. Robilliard* [1955] S.A.S.R. 88.

⁴² By section 7 (1) of the Divorce and Matrimonial Causes Act, 1953, which was inserted into the Act of 1928 as section 10 (j) divorce is allowable on the ground—

“That the petitioner and the respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years.”

See Sim, *op. cit.*, pp. 50–51.

⁴³ Clause 1 of the Bill provides that—

“(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that—

(a) the parties have lived separately for a period of not less than seven years immediately preceding the petition; and

(b) there is no reasonable prospect that cohabitation will be resumed.”

The Bill received a second reading by a majority of 131 votes to 60 (H.C. Debs., March 9, 1951, Vol. 485, cols. 999 *et seq.*), but was withdrawn on Committee stage on the Government's undertaking to appoint a Royal Commission (Official Report, Standing Committee B, 1950–1951, col. 881).

A similar provision appears in the law of Western Australia. By section 15 (j) of the Matrimonial Causes and Personal Status Code (W.A.), 1948, it is a ground for divorce where there has been a separation of the spouses for a continuous period of five years immediately preceding the petition and where there is no likelihood of cohabitation being resumed. See *Ayling v. Ayling* (1949) 51 W.A.L.R. 61; *Bell v. Bell* (1953) 55 W.A.L.R. 87; the court in the former case in testing whether cohabitation had been resumed relied on the English cases of *Hopes v. Hopes* [1949] P. 227 and *Smith v. Smith* [1940] P. 49; see generally on this provision, *Pearlow v. Pearlow* (1953) 90 C.L.R. 70 and Joske, *op. cit.*, pp. 91–92. The provision was noted by F. B. Adams J. in *McRostie v. McRostie* [1955] N.Z.L.R. 631 at p. 635.

An unusual provision occurs in section 15 (f) of the Code whereby an habitual failure to maintain by virtue of the terms of an order or agreement under which parties have been separated for three years is also a ground for divorce. See *Martin v. Martin* (1951) 52 W.A.L.R. 53; *Smith v. Smith* (1951) 52 W.A.L.R. 71; *Harding v. Harding* (1951) 52 W.A.L.R. 84. Similarly, see section 6 (j) of the South Australian Matrimonial Causes Act, 1929–1936 as amended in 1938; see note 34 *supra*.

⁴⁴ On “separation,” see *Ansley v. Ansley* [1931] N.Z.L.R. 1010. Cessation of intercourse only is not “separation,” *Paterson v. Paterson* [1928] N.Z.L.R. 401; *Buhck v. Buhck* [1947] N.Z.L.R. 709; *Daniels v. Daniels* [1949] N.Z.L.R. 70. For the interpretation of separation in section 10 (jj) see *Wilson v. Wilson* [1955] N.Z.L.R. 175; *McRostie v. McRostie* [1955] N.Z.L.R. 631; *Adams v. Adams* [1955] N.Z.L.R. 1245; *Kelman v. Kelman* [1956] N.Z.L.R. 74.

appears to connote the antithesis of "living apart."⁴⁵ The fact that the petitioner is in desertion does not prevent the granting of a decree. As F. B. Adams J. said in *McRostie v. McRostie*⁴⁶: "The petitioner succeeds by proving desertion on her [or his] part. This, however, is not anomalous but characteristic of this new ground for divorce, the purpose of which is, I think, that even guilty spouses may get relief where their marriages have ceased to be real unions. Unless it be so understood, section 10 (jj) seems almost, if not quite, supererogatory."

In the case of the undefended petition the court must still exercise its discretion in accordance with the first limb of section 18.⁴⁰ Where, however, the petition is defended, thereby invoking the second limb of section 18, a general plea by the respondent to have the petition dismissed together with a finding of desertion on the part of the petitioner is sufficient to infer a "wrongful act or conduct" and thus prevent the granting of a decree.⁴⁷ Despite the hardship that may thus be produced⁴⁸ the answer seems to lie in the possibility that the "deserting" spouse although *prima facie* appearing to have committed a matrimonial offence⁴⁹ may be able to establish a separation by agreement and so enable the provisions of section 10 (i) to be invoked.

By section 10 (i) the agreement⁵⁰ for separation or separation

⁴⁵ *McRostie v. McRostie* [1955] N.Z.L.R. 631; *Adams v. Adams* [1955] N.Z.L.R. 1245 at p. 1249.

"Reconciliation" has been considered in some English cases in connection with the extent of forgiveness so as to establish condonation of a matrimonial offence. In *Roe v. Roe* (1956) *The Times*, July 19, Collingwood J. in the Divisional Court and Denning L.J. in *Mackrell v. Mackrell* [1948] 2 All E.R. 858 at p. 861 followed a passage from *Keats v. Keats and Montezuma* (1848) 1 Sw. & Tr. 334 to the effect that "the forgiveness which is to take away a husband's (or wife's) right to a divorce must not fall short of a reconciliation. Reconciliation in turn would seem to import the element of mutuality."

⁴⁶ [1955] N.Z.L.R. 621 followed in *Marriott v. Marriott* [1956] N.Z.L.R. 125 at 127 *per* Hutchinson J. Furthermore, it is not necessary that the petitioner as deserter should communicate intention to the respondent.

⁴⁷ *Freeman v. Freeman* [1955] N.Z.L.R. 924 *per* Shorland J.; *Wadsworth v. Wadsworth* [1955] N.Z.L.R. 993 *per* Turner J. In neither of these cases was *McRostie* cited.

⁴⁸ Turner J. in *Wadsworth v. Wadsworth* [1955] N.Z.L.R. 993 at p. 994 said: "This is an unfortunate result for the petitioner but to take any other course would be to hold that a man may desert his wife and after waiting seven years may successfully maintain an application for divorce, even in the face of opposition. This I do not conceive to be the law." See "Divorce: Seven Years' Separation," (1956) 31 N.Z.L.J. 321.

⁴⁹ The view that "wrongful act or conduct" was to be interpreted narrowly as meaning a matrimonial offence—a view held by Salmond J. in *Lodder v. Lodder* [1923] G.L.R. 122—was rejected by the Court of Appeal in *Schlager v. Schlager* [1924] N.Z.L.R. 1011.

⁵⁰ Where one party is an infant and the agreement is not for the benefit of the infant the agreement is invalid, *Hole v. Hole* [1948] N.Z.L.R. 42; *Bell v. Bell* [1953] N.Z.L.R. 805; in *McGurn v. McGurn* [1956] N.Z.L.R. 106, Turner J. thought that in divorce proceedings there could be no question of benefit to an infant and rejected (p. 110) Fair J.'s analogy of the marriage contract with the contract of necessities made in *Hole v. Hole*. See, "Divorce:

order⁵¹ which has been in full force and effect for at least three years⁵² may be made not only by deed or other writing but also verbally, although the burden of proof in such cases appears to be a heavy one.⁵³ The question as to whether an implied or inferred agreement falls within the section was expressly left open by the court in *Ducker v. Ducker*.⁵⁴

The general policy of the two sections as affected by section 18 has been considered judicially in two notable instances. In *Lodder v. Lodder*,⁵⁵ Salmond J. said:

"In general it is not in the interests of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."⁵⁶

Infant Parties in Divorce founded on Separation Agreements," (1956) N.Z. L.J. 341.

The agreement is in such cases voidable and not void *ab initio*, *Nicholson v. Nicholson* [1952] N.Z.L.R. 53; *Blair v. Blair* [1952] N.Z.L.R. 662, since an infant can, it seems, ratify the agreement on attaining majority, *McGurn v. McGurn* [1956] N.Z.L.R. 106.

⁵¹ Until 1928 a separation order made in New Zealand only was applicable. *Jackson v. Jackson* [1923] N.Z.L.R. 608, see now section 10 (j) of the 1928 Act; an agreement for separation by deed or otherwise can be made outside New Zealand, *Chapman v. Chapman* [1926] N.Z.L.R. 291.

⁵² The agreement must be permanent from its inception and continue to be so during the triennium, *Fairchild v. Fairchild* [1924] N.Z.L.R. 276, see *McKay v. McKay* [1949] N.Z.L.R. 217; *Ducker v. Ducker* [1951] N.Z.L.R. 583 at p. 585; *Wright v. Wright* [1952] N.Z.L.R. 650; *White v. White* [1953] N.Z.L.R. 1054. For the interpretation of "full force and has been in full force," i.e., full force and effect, see *Buhck v. Buhck* [1947] N.Z.L.R. 709; *Glasgow v. Glasgow* [1948] N.Z.L.R. 810; *Emery v. Emery* [1946] N.Z.L.R. 545; *Cronin v. Cronin* [1945] N.Z.L.R. 180; *Daniels v. Daniels* [1949] N.Z.L.R. 70; *Green v. Green* [1951] N.Z.L.R. 968; *McKenna v. McKenna* [1952] N.Z.L.R. 36; *Bly v. Bly* [1952] N.Z.L.R. 127; *Leslie v. Leslie* [1954] N.Z.L.R. 414; *Neilands v. Neilands* [1955] N.Z.L.R. 146 (the headnote of which incorrectly cites the section of the Act as section 10 (c)); *Chapman v. Chapman* [1955] N.Z.L.R. 231; *Stilwell v. Stilwell* [1956] N.Z.L.R. 700.

The question whether the separation was in full force and effect throughout the triennium under section 10 (i) "must be answered not by reference to the intention of the parties but as to whether in fact the parties have during the whole of that time completely abstained from entering into a relationship only moral if entered into in the status of marriage," *Bennett v. Bennett* [1936] N.Z.L.R. 872 at pp. 878 and 884 and *Wilkins v. Wilkins* [1956] N.Z.L.R. 532 at pp. 536-539; no distinction can be made to "full force and has been in full force" in section 10 (i) and section 10 (j) (where separation is under a court order), *Wilkins v. Wilkins supra* at pp. 539-540.

⁵³ *Baker v. Baker* [1955] N.Z.L.R. 145.

⁵⁴ [1951] N.Z.L.R. 583 at p. 590. *Green v. Green* [1951] N.Z.L.R. 968 at p. 970; see *Minutes of Evidence*, 39th day, Royal Commission, p. 954, para. 10.

Prior to 1928 when the principal Act was passed the provision was worded as "separation by mutual consent" as opposed to "agreement for separation." Under the earlier wording it had been held that an agreement to separate could be implied from conduct of the spouses, *McLean v. McLean* [1925] N.Z.L.R. 687 at p. 688 *per* Sim J. and *Hylton v. Hylton* [1927] N.Z.L.R. 777.

⁵⁵ [1921] N.Z.L.R. 876 at pp. 877-879 and 889; see, McGregor J. in *Adams v. Adams* [1955] N.Z.L.R. 1245 at p. 1250.

⁵⁶ This latter part was reiterated by Gresson J. in *Crewes v. Crewes* [1954] N.Z.L.R. 1116 at p. 1121.

Salmond J. went on to contend that there must not be any levity or wanton disregard by the parties of the matrimonial state or any device to secure dissolution by mutual consent. This apart the law ought to end a marriage which cannot be mended. The observations made by Salmond J. were reflected in the enactment in the 1921-1922 legislation (now section 18 of the principal Act of 1928) as recorded in the first limb of that section.

Referring to the 1953 amendment of the law and the dual effect of section 18, Gresson J. in *Crewes v. Crewes*⁵⁷ commented:

"The recent amendment to the law . . . is a legislative recognition of the principle long ago laid down in *Mason v. Mason* ([1921] N.Z.L.R. 955; [1921] G.L.R. 635) that it is not conducive to the public interest that men and women should remain bound together in permanence by the bonds of a marriage which has irremediably failed and the application to that ground of divorce of the discretion conferred by section 18 is a legislative recognition of the principle of equal importance that there may be cases where the petitioner has been guilty of such grave matrimonial misconduct that in the public interest a decree should be refused."

One interesting social effect of the New Zealand legislation, which appears to have gone unnoticed by the Royal Commission, is that relating to children; in view of the Report's grave concern for the children of divorced parents this omission seems all the more inexplicable. Mr. Justice Finlay in his evidence to the Commission stated, in answer to a question whether the interests of children were more amicably and reasonably settled⁵⁸: "When the case comes to court three years later, that arrangement [*i.e.*, custody of children]—well considered or ill-advised as it may be—is an existing arrangement. It is a *status quo*. To that extent it does make a settlement of the custody question easy because the parties are agreed, but I doubt very much if one could get that agreement if it were not for the fact that concessions were made in order to get the separation." In the evidence of W. E. Leicester, Esq., there appears this remark⁵⁹: "I have found that when the ground for divorce is separation the parties have remained on good terms after the separation and the children have derived inestimable benefit when it comes to the divorce from this fact that the period during which their parents have been apart has not widened their differences." This absence in New Zealand law both of any artificiality in the proceedings for divorce such as exist in the present law⁶⁰ in this country and

⁵⁷ [1954] N.Z.L.R. 1116 at p. 1121; *Bennett v. Bennett* [1936] N.Z.L.R. 872, 883; *Wilkins v. Wilkins* [1956] N.Z.L.R. 532 at pp. 534-538.

⁵⁸ *Minutes of Evidence*, 40th day, Q. 9383, p. 966.

⁵⁹ *Ibid.*, 39th day, Q. 9292, p. 957. See also Q. 9308, p. 958.

⁶⁰ There is no better example than the "hotel" cases, see *e.g.*, *Woolf v. Woolf* [1931] P. 134. The position was critically appraised by Karminski J. in *Raspin v. Raspin* [1953] P. 230. Generally, see C. P. Harvey, Q.C., "On the State of the Divorce Market," 16 M.L.R. (1953) 129.

of the allegation and proof of a matrimonial offence is of sufficient merit to warrant closer study. The removal of acrimonious disputes which are presently waged between spouses in the guise of both parties asserting their rights to the custody of the children is deserving of encouragement even if it is only for the benefit of the children and not the state of matrimony generally. More still, since the grounds for divorce are devoid of reportable incidents, publicity is negligible.

As ancillary considerations either of these grounds of separation will invariably provide the means of divorce in two situations:—

- (a) Decrees for the presumption of death and dissolution of the marriage under section 16, M.C.A., 1950, would become otiose. The present difficulties which cause potential injustice to a surviving spouse⁶¹ would thus be removed.
- (b) In cases of a spouse having been committed to prison for a long period, the other spouse will be relieved from the possibility of having to contest bitterly fought cases such as *Woolard v. Woolard*⁶² and *Ingram v. Ingram*.⁶³

The temporary shelving of the Royal Commission's Report seems to indicate the present Government's unwillingness to grapple with the basic concepts which should determine the nature of our divorce laws.⁶⁴ A greater and fuller appreciation of the New Zealand legislation seems desirable to convince those who support the doctrine of the matrimonial offence that as in so much of legal reform of a social nature⁶⁵ the New Zealand experience might with advantage be adopted in this country.

L. J. BLOM-COOPER.*

⁶¹ *Parkinson v. Parkinson* [1939] 3 All E.R. 108; *Sosnowski v. Sosnowski* [1954] S.A.S.R. 201; *Middlemiss v. Middlemiss* [1955] 4 D.L.R. 801 (Can.); *Chard v. Chard* [1955] P. 259; *Thompson v. Thompson* [1956] 2 W.L.R. 814; 1 All E.R. 603; *Ward v. Ward* (1956) *The Times*, February 10, cited in *Thompson* at p. 821; *Berzins (orse.) Lieje v. Berzins* [1956] 5 C.L. 120; 19 M.L.R. (1956) 208. The difficulty in the case where the spouse reappears after a decree of presumption of death, which the Royal Commission considered (paras. 1193–1198), would be obviated. Similarly insanity could be dealt with on this ground: Royal Commission's Report, paras. 172–205, pp. 5–13.

⁶² [1955] P. 85.

⁶³ [1956] 2 W.L.R. 782; [1956] 1 All E.R. 785; noted at 19 M.L.R. (1956) 546.

⁶⁴ See a letter to the Editor of the *Manchester Guardian*, "Grounds for Divorce," September 29, 1956.

⁶⁵ e.g., 1. New Zealand Family Protection Act, 1900, was the first of its kind in the Common Law countries. See, Davern Wright, "Testators' Family Maintenance in Australia and New Zealand" (1954).

2. The Neglected and Criminal Children's Act, 1867, was an early move to protect children in industrial work.

3. Adoption was introduced by the Adoption of Children Act, 1881, and was the model upon which many common law countries framed their legal adoption legislation; see, Campbell, *Law of Adoption in New Zealand*, (1952) pp. 5 *et seq.*

* LL.B.(London), DR.JUR.(Amsterdam); of the Middle Temple, Barrister-at-Law.

THE EFFECT OF MARRIAGE UPON PROPERTY IN SCOTS LAW¹

In the common law of Scotland there existed from medieval times until the nineteenth century a system of proprietary relations between spouses characterised by many of the distinctive features of a community system in its technical sense. That system has been abolished only in part, and some knowledge of its features is necessary for an understanding of the modern law.

The institutional writers spoke of the "communion of goods betwixt the married persons,"² but the legal device which gave effect to the community was extremely crude. Marriage carried the moveable estate³ of the wife to the husband by an implied universal assignation known as the *jus mariti*. Its passive counterpart was the husband's liability for his wife's pre-marital moveable debts. During the marriage no steps were taken to protect the wife's interest and the husband could deal with the "goods in communion" as if she did not exist. On its dissolution, however, there emerged the widow's *jus relictæ*, by which she became entitled to one-third or one-half of her husband's moveable estate—one-third if he left children and one-half if he left no children or if the children's right to *legitim* had been discharged.⁴ *Jus relictæ* subsists unchanged today. The common law vested no corresponding right in the husband because in theory the wife had no moveable estate of her own.

The *jus mariti* could be renounced by the husband in an antenuptial contract and could be expressly excluded by a third party conveying or bequeathing estate to the wife. In relation to such estate, and to the heritable estate of the wife, the husband enjoyed a right of administration; that is to say, his consent was required to every act of management of his wife's estate. This right, too, could be renounced or excluded; but its exclusion was not inferred automatically from an exclusion of the *jus mariti*.

¹ Portions of the following discussion have already been published and are reproduced with the permission of the Institut de Droit Comparé de l'Université de Paris and of the Editor of the *Scots Law Times*. The article was written before the publication of the Report of the Royal Commission on Marriage and Divorce (Cmd. 1956, No. 9678) and takes no account of its recommendations.

² Stair's *Institutions*, i.4.9 and 17; Erskine's *Institutes*, i.6.12; Bell's *Principles*, para. 1549.

³ Heritable estate is property which is either immoveable in fact or by presumption of law. All other property is moveable.

⁴ Even when a wife predeceased her husband her executors were entitled at common law to one-third or one-half of the husband's moveable estate. Since this right arose during the husband's lifetime it cannot be described as a right of succession. It was abolished by the Intestate Moveable Succession (Scotland) Act, 1855, s. 6.

The fruits of the wife's heritage were moveable and fell under the husband's *jus mariti*. The husband's right to these fruits could be said to have been projected beyond the dissolution of the marriage by the husband's right of courtesy, which entitled (and still entitles) a widower to the liferent enjoyment of his former wife's heritage.⁵ A widow, on the other hand, had (and still has) merely the right to the liferent of one-third of her former husband's heritable estate, a right referred to as "terce."

The exclusion both of the husband's *jus mariti* and his right of administration did not mean that a wife could contract as though she were unmarried. The common law, in the words of Erskine, was "so solicitous to protect wives from imposition while they are *sub cura mariti*, as to declare all personal obligations granted by the wife, though with the husband's consent, to be *ipso jure* void . . . because her person being *quodammodo* sunk in that of her husband, is not a proper subject of obligation."⁶ A married woman could grant competently neither bonds, bills, promissory notes, cautionary obligations, nor guarantees. This disability had no direct connection with the *jus mariti* and the husband's right of administration, because her obligations were void "though with her husband's consent" and where she held property exclusive of her husband's right of administration. The practical objection to any other rule would have been the levying of diligence against the person of the wife and the rule applied only where the enforcement of the obligation might subject her to personal diligence. She might therefore alienate her property, with the consent of her husband where necessary.

The community concept, such as it was in the common law of Scotland, was undeveloped and bore many traces of its primitive origins.⁷ It was, therefore, out of place to subject it to a rigorous analysis in terms of a sophisticated jurisprudence. Yet, with the quasi-reception of Roman law in Scotland, it was inevitable that the concept should be judged according to Roman ideas about ownership, obligation, and partnership. It was not long before Scottish jurists emphasised the incompatibility of the husband's unfettered *jus utendi et abutendi* of the estate falling to him *jure mariti* with any principle of common ownership.⁸ At the same time the Union of the Parliaments led Scots lawyers to

⁵ Courtesy in the common law of Scotland differed slightly from the corresponding institutions in Normandy and England. In early documents it is referred to as the "courtesy of Scotland": R. K. Hannay (ed.), *Acts of the Lords of Council in Civil Affairs*, p. 179.

⁶ Erskine, *supra*, i.6.25.

⁷ By way of illustration it may be mentioned that formerly a wife was not entitled to *jus relictæ* unless a child had been born of the marriage or unless it had subsisted for a year and a day. A similar rule is to be found in many of the French customs and has been linked there with the usage of the *communauté taissable*, a primitive Germanic institution of which traces are to be found in Scotland.

⁸ *Levan v. Montgomery* (1688) M. 5803; Bain, *Notes to Mackenzie's Institutions*, i.6.8.8.

turn away from the traditional Continental sources of their legal inspiration to the law of England, and there the idea of a community of goods between spouses was quite unknown. An attempt was made in 1709 to introduce the French principle of a *separatio bonorum* when the wife's interests were being prejudiced by her husband.⁹ Its failure made inevitable the eventual rejection of the community concept.

LEGISLATIVE CHANGES

Unless the wife was protected by a marriage contract, the extent of her husband's common law rights placed her in a condition of complete dependence upon him. In the latter part of the nineteenth century the social forces which in England led to the passing of the Married Women's Property Acts led in Scotland to a series of statutes which first modified the common law by excluding the husband's rights in special circumstances and then radically altered it by abolishing them completely. The content of these statutes was in part suggested by that of earlier legislation in England. It was naturally less difficult to persuade the legislature to apply reforming legislation to Scotland when the reform had already taken place in England.¹⁰ However, the main stream of legislation on this topic in Scotland could not follow the course adopted in England because the authors of the English Married Women's Property Acts chose the roundabout method of making the property of a married woman during coverture her "separate property" in the technical sense attached to that term by the Court of Chancery. This would have been meaningless in Scotland, but the same objects were achieved by the obvious and direct method of abolishing the husband's rights. In 1881 the Married Women's Property (Scotland) Act provided that the whole moveable estate of the wife acquired before or during the marriage should vest in the wife as her separate estate and not, as previously, in the husband by virtue of his *jus mariti*, and that the rents and produce of her heritable property should be subject neither to the *jus mariti* nor to the husband's right of administration. As a species of compensation to the husband he was granted the same share and interest in his deceased wife's moveable estate as is taken by a widow in her deceased husband's moveable estate.¹¹ This Act preceded the [English] Married Women's Property Act, 1882, and in several ways went less far than it. The husband's right of administration still precluded a wife from dealing with the capital of her estate, heritable and moveable, without his

⁹ *Turnbull v. Turnbull's Creditors* (1709) M. 5895.

¹⁰ Cf. Matrimonial Causes Act, 1857, s. 21, and Conjugal Rights (Scotland) Amendment Act, 1861, s. 1; Married Women's Property Act, 1870, s. 1, and Married Women's Property (Scotland) Act, 1877, s. 3; Married Women's Property Act (1870) Amendment Act, 1874, and s. 4 of 1877 Act.

¹¹ This right of the husband is now known as *jus relictii*; *Buntine v. Buntine's Trs.* (1894) 21 R. 714, 719.

consent. Moreover the 1881 Act conferred no contractual capacity upon married women. Until 1920 a married woman in England had a much more complete and independent control of her property than was possessed by her counterpart in Scotland. In that year, however, a Bill was introduced with the avowed aim of placing a married woman, as regards her own property, in exactly the same position as her husband. It passed into law with remarkably little debate as the Married Women's Property (Scotland) Act, 1920. The husband's right of administration was wholly abolished and a married woman declared to have the same powers of disposal of her estate, heritable and moveable, as if she were unmarried, and was empowered to enter into contracts, incur obligations, sue and be sued, as if she were unmarried. Her husband was absolved from liability in respect of her contracts and obligations. A husband's curatory of his wife was to subsist during her minority only; and a married woman was to be liable for the maintenance of her indigent husband.

THE PRESENT POSITION

Proprietary relations

The Acts of 1881 and 1920 effectively destroyed the matrimonial régime of Scots common law but set up nothing in its place. The Acts can hardly be said to have established a régime of separation of goods because such a phrase would appear to imply the existence of a special body of law regulating the pecuniary relations of the spouses, the liability of each to contribute to the expenses of the household, the ownership of property which has become inmixed, and kindred matters. No such rules were laid down and the proprietary relations of the spouses are governed in essence by the rules which apply as between strangers, with these qualifications, that spouses are obliged to aliment each other and have legal rights in each other's estates on the dissolution of the marriage.

Since 1920 marriage by itself has no effect upon the proprietary relations of the parties to it. It does not even operate as a revocation of a spouse's will. Each spouse remains the proprietor of his or her own estate and no limitations whatever are imposed upon the faculty of either to deal *inter vivos* with his or her own estate. He or she may alienate it without the consent of his or her spouse even to the prejudice of the latter's legal rights. Neither spouse is liable in practice for the antenuptial debts of the other. The Married Women's Property (Scotland) Act, 1877, provided that the liability of a husband for the antenuptial debts of his wife should be limited to the value of any property which he should have received from, through, or in right of his wife. This provision has not been repealed; but since a husband is no

longer necessarily *lucratus* on marriage the occasions are few when he becomes liable for her antenuptial debts.

Not every wife, however, enters marriage with property of her own and where she has none or very little the equality between husband and wife claimed to result from the Acts of 1881 and 1920 is purely formal. The formal rule that the earnings of either spouse remain his or her own property may be translated into the practical rule that the earnings of the husband remain his property. This is best illustrated in cases relating to savings from the wife's household allowance. Prior to the Married Women's Property Acts these belonged to the husband because they automatically fell under his *jus mariti*. Today the same result is reached by saying that a wife's right to administer the house-keeping moneys does not entitle her to make savings for herself out of that which belongs to her husband and of which she is only stewardess.¹² If, however, the wife is living apart from her husband by agreement, or with legal justification, her savings from an alimentary provision remain her own property. The ratio of this distinction is that the payments are no longer made to her as *praeposita rebus domesticis*, but in discharge of her husband's obligation to maintain her and in lieu of the support which she would obtain if she were living in family with him.¹³ The presumption that savings from sums handed to the wife for household expenses belong to the husband subsists even where these savings are rendered possible only by the fact that the wife maintains herself by her own earnings. In *Preston v. Preston*¹⁴ a husband, who was serving in the Forces, made regular payments into a savings account in the name of his wife. Although she might have done so, the wife made no withdrawals from this account for maintenance, but subsisted entirely upon her own earnings. It was held that the sum in the account belonged to the husband. It would seem that if Mrs. Preston had chosen to bank her own earnings and to live on her husband's remittances, she could have resisted her husband's claim; but her misguided selection of the wrong method of book-keeping deprived her of the right to claim even a share of the family savings. In this state of the law it is not surprising that Lord President Cooper prophesied that the altered status of the married woman must soon compel a drastic revision of the traditional doctrines.

The fact that, unless the wife has a separate income, only the husband can accumulate savings almost inevitably entails that the family furniture and household effects will belong exclusively to the latter. There is no trace in Scotland of the doctrine which appears to be emerging in England that furniture and household effects designed as a continuing provision for the benefit of both

¹² *Logan v. Logan*, 1920 S.C. 537; *Smith v. Smith*, 1933 S.C. 701.

¹³ *Preston v. Preston*, 1950 S.C. 253, per Lord Keith at p. 260.

¹⁴ *Supra*.

spouses should be held to belong to them jointly. It was argued in *Harper v. Adair*,¹⁵ where a married woman was charged with breaking into the house occupied by her husband and stealing furniture there, that there was a presumption that furniture purchased by a husband intended for the joint use of the spouses became their joint property; but the Lord Justice-General, Lord Normand, remarked: "I think there is no presumption of joint property, and that when a husband purchases furniture or other goods out of his own funds, the presumption is that they are his own property."¹⁶ The same result would follow where the furniture is paid for by the wife out of savings from her household allowance, for these belong to her husband; also where furniture is bought on hire-purchase out of the household allowance, even where the contract is in the name of both spouses. A wife may, of course, have purchased out of her own funds articles intended for the joint use of herself and her husband. These would presumably belong to her alone. Similarly, a wife's clothes and other things *quae sunt de mundo muliebri*¹⁷ are paraphernal and the separate estate of the wife. Where the effects are a donation from some third party, the practical rule usually applied is to regard as the owner the spouse from whose friends or relatives the gift came. It has been suggested, however, that the true test is the intention of the donor, and that in certain cases the nature of the gift itself (*e.g.*, a necklace) will supply the answer.¹⁸ It is questionable whether the principle of separate ownership of household effects is a desirable one. It is something of a hardship to wives to find that they have no legal interest in property which they looked upon as at least partially their own. But it may also cause hardship to third parties. If a wife sells to a dealer furniture which she says belongs to her but which really belongs to her husband, the latter may recover it if it was sold without his consent and the dealer's good faith is no answer.¹⁹ On the other hand, when a creditor holding a decree against a married man attempts to poind (or attach) furniture thought to belong to the husband, his wife may intervene and claim that it all belongs to her. It has been judicially remarked that when it is "household furniture that is to be attached, in probably nine cases out of ten the compeerer is the debtor's wife."²⁰

By parity of reasoning it will usually be held that the matrimonial home belongs to the husband exclusively. He will have supplied the funds and the presumption applies that the owner

¹⁵ 1945 J.C. 21.

¹⁶ *Preston, supra*, at p. 28.

¹⁷ *Mistress of Gray v. The Master* (1582) M. 5802.

¹⁸ *McDonald v. McDonald*, 1953 S.L.T. (Sh.Ct.) 36.

¹⁹ *Peggie v. Rez & Company (Falkirk) Ltd.*, 1945 S.L.T. (Sh.Ct.) 25.

²⁰ *Cameron v. Cuthbertson*, 1924 S.L.T. (Sh.Ct.) 67, at p. 68; *cf. Farrell v. R. Gordon & Co.*, 1928 44 Sh.Ct.Rep. 208; *Mazwell v. Controller of Clearing House*, 1923 S.L.T. (Sh.Ct.) 137.

is the person out of whose funds the house has been purchased. The mere fact that a husband buys property and takes the title in the name of his wife is not sufficient to overcome the presumption against donation and to raise a presumption that he intended an absolute gift.²¹ A special problem arises where both the spouses have contributed capital or periodic savings towards the purchase of the matrimonial home. As yet there has been no precise analogue in Scotland to the English cases of *Jones v. Maynard*,²² *Rimmer v. Rimmer*,²³ and *Cobb v. Cobb*.²⁴ The decision most nearly in point is that in *McDougall v. McDougall*.²⁵ A husband and wife intended to purchase a house. The missives of sale were in the husband's name alone, but part of the price, £70, was derived from the wife, being in fact lent by her mother, and the remainder raised by a building society loan. The loan application was in the name of both spouses, who also completed together proposal forms for a combined assurance policy on their lives as collateral security. Before the seller had granted the disposition the husband sold the property at a greatly enhanced price and pocketed the proceeds. The wife raised an action, claimed repayment of the £70 and half the net profit on the sale. Lord Birnam had a much simpler problem than that presented in the case of *Rimmer* because it was much easier to infer that the implied contract between the spouses was that the title should be taken in the spouses' joint names and that the property should belong to them jointly. Consequently, he sustained the wife's claim. It remains to be seen whether this decision will be the basis of further developments. It seems unlikely, since there is nothing in the Scottish statutes analogous to section 17 of the Married Women's Property Act, 1882. The question of the ownership of the matrimonial home is important not merely because it may be the most valuable single asset of the spouses, but because in Scotland the spouse who owns the property may eject the other spouse from it without showing any justification for the action and without offering any alternative accommodation.²⁶ There is no trace in Scotland of the rule in *Bendall v. McWhirter*.²⁷ Our courts are reluctant to depart from the strict considerations of law which are commonly applied between strangers and it has been said that the question must be approached from the matrimonial point of view and that the matrimonial relationship of the parties is irrelevant.^{27a}

²¹ *Newton v. Newton*, 1923 S.C. 15, especially Lord Sands at p. 26; *Beveridge v. Beveridge*, 1925 S.L.T. 234; *R. v. R.*, 1925 S.L.T. (Sh.Ct.) 45.

²² [1951] Ch. 572.

²³ [1953] 1 Q.B. 63.

²⁴ [1955] 2 All E.R. 696.

²⁵ 1947 Session Notes 102.

²⁶ *MacLure v. MacLure*, 1911 S.C. 200; *Millar v. Millar*, 1940 S.C. 56; *Cairns v. Halifax Building Society*, 1951 S.L.T. (Sh.Ct.) 67.

²⁷ [1952] 2 Q.B. 466.

^{27a} See note on next page.

The same attitude colours the law as to donations between husband and wife. When a stranger pleads donation it is, of course, up to him to prove the *animus donandi*, and it is said that the presumption is against donation. "No person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss."²⁸ But this reasoning is less compelling when the alleged donee is a person for whom the donor may be supposed to cherish some affection.²⁹ Yet the presumption is held to subsist between husband and wife.³⁰ Donation is usually proved by the evidence of third parties and the fact of delivery of the gift but, in the case of gifts by one spouse to another, there is unlikely to be such evidence, and the fact that the property remains in the home may make it difficult to prove delivery. This difficulty arises not only in the case of gifts of corporeal assets but in the case of gifts of sums in the bank, deposit receipts and stocks and shares, since the husband is still the natural custodian of his wife's titles.

The Wife's Praepositura

There was an obvious contradiction between the rule of Scots common law that a wife was under the curatorial power of her husband and the practice of everyday life which reserved to the wife the duty of purchasing the daily requirements of the household. Marriage, however, did not and does not deprive a wife of the capacity to act as agent for her husband and it is presumed that a wife living in family with her husband is acting as his agent in purchasing household necessities, such as food, clothing, furniture, and medical attention. Since the same presumption may be invoked in relation to the actings of a sister or daughter, it flows from agency rather than from the fact of marriage.³¹ Consequently, the mandate may be revoked by the husband. A husband may forbid his wife to purchase goods on credit and thereupon he ceases to be liable for her contracts, except to persons with whom there has been a course of dealing. The husband may notify such persons privately of the determining of his wife's *praepositura* or he may do so by the judicial process of inhibition. In this context the inhibition is a judicial order obtained on the application of the husband prohibiting the wife from contracting debt and other persons from giving her credit to the prejudice of her husband. No reason need be given by the husband and

^{27a} In *Temple v. Mitchell*, 1956 S.L.T. (Notes) 53 the Second Division (Lord Mackintosh dissenting) declined to follow *Old Gate Estates, Ltd. v. Alexander* [1950] 1 K.B. 311, holding that in Scotland the deserted wife of a statutory tenant is not entitled to the protection of the Rent Restriction Acts.

²⁸ Erskine, iii.3.92.

²⁹ *Crosbie's Trs. v. Wright* (1880) 7 R. 823, at p. 833.

³⁰ *Beveridge v. Beveridge*, *supra*, at p. 236.

³¹ *Hamilton v. Forrester* (1825) 3 S. 572.

the inhibition is granted as a matter of course. It is served on the wife by an officer of court and is published by registration in the General Register of Inhibitions. No other publication is necessary and the inhibition is effectual even although tradesmen have no knowledge of it.³² The withdrawal by a husband of his wife's *praepositura* does not necessarily mean that a wife cannot enter into contracts for necessities which bind the husband. Here, however, the liability of the husband does not rest upon agency but upon the fact that a husband is bound to aliment his wife.

The obligation to aliment

A husband is bound to supply his wife with the means of subsistence. Scots law considers this duty to arise less as a *quid pro quo* for the wife's performance of her marital obligations than as a consequence of the bond of marriage. It is true that a husband is not obliged to maintain his wife when she lives apart from him without justification; but this is because a husband may discharge his obligation to aliment by offering to maintain his wife at bed and board. It is significant that, contrary to the position in England, the law of Scotland may oblige a husband to maintain a wife who has committed adultery until decree of divorce has been pronounced.³³

The husband's alimentary obligation subsists as long as the bond of marriage. Judicial separation leaves unaffected the duty to aliment. This is so even when the decree has been granted on the ground of the wife's cruelty or adultery.³⁴ The obligation may even be said to survive the dissolution of the marriage because it may affect a deceased husband's estate when the widow's legal rights have been exhausted or discharged.³⁵ But there is no similar subsistence of the obligation after divorce.³⁶

A husband is not liable to maintain his wife if she has sufficient means of her own or if he pay her a suitable allowance or, it seems, an agreed allowance.³⁷ Aliment is granted for present maintenance only. A wife, therefore, cannot sue for arrears of aliment unless its amount is quantified by a decree of court or in a contract of voluntary separation.

It might be thought that, since Scots law imposes upon the husband a duty to aliment his wife, the latter would have a correlative right to enforce that duty by civil process whenever the husband was in breach of it. But that is not so. The wife's remedies are indirect. Failure on the part of a husband to aliment

³² *Topham v. Marshall*, 1808, Mor.App. "Inhibition," No. 2.

³³ *Milne v. Milne* (O.H.) (1901) 8 S.L.T. 375.

³⁴ *Nisbet v. Nisbet* (O.H.) (1896) 4 S.L.T. 158.

³⁵ See *Thomson v. Anderson's Trustees* (1899) 6 S.L.T. 258 and 298.

³⁶ *Stewart v. Stewart* (O.H.) (1872) 10 M. 472.

³⁷ *Auchinleck v. Monteith* (1675) M. 5879; *Robins v. Southesk* (1688) M. 5955; *Adair v. Adair* (O.H.), 1932 S.N. 47 and 69.

his wife may in serious cases amount to such cruelty as will ground an action of separation or of divorce. It will justify tradesmen in supplying necessities to the wife on the husband's credit. Moreover, the National Assistance Board may grant monetary assistance to the wife, which it may recover from the husband by civil process.³⁸ What Scots law does not provide for is the wife claiming aliment during the subsistence of normal conjugal relations with her husband. Except when she enforces payment of aliment agreed in a contract of voluntary separation, a wife's claim for aliment is always subsidiary to a conclusion either for adherence or for separation.³⁹ The former remedy is one which she may not desire and the latter one to which she may not be entitled. Section 23 of the Matrimonial Causes Act, 1950, was designed to remove a similar anomaly in English law; but there is as yet no corresponding legislation in Scotland.

Section 4 of the Married Women's Property (Scotland) Act, 1920, lays on a wife with a separate estate or a separate income more than reasonably sufficient for her own maintenance the obligation of providing her husband with such maintenance as he would in similar circumstances be bound to provide for her.⁴⁰ Since a husband is not liable to aliment a wife who has sufficient income to maintain herself, a wife would be under no obligation to aliment a husband in similar circumstances. In other words, Scots law makes no provision for the apportionment of household expenses where both spouses are in receipt of incomes.⁴¹

Contractual liabilities and capacities

The contractual incapacities of the married woman at common law were modified by the Acts of 1861, 1877, and 1881 and wholly removed by the Act of 1920. Apart from abolishing the husband's right of administration and curatorial powers, the 1920 Act expressly declared: "A married woman shall be capable of entering into contracts and incurring obligations and be capable of suing and being sued, as if she were not married, and her husband shall not be liable in respect of any contract she may enter into or obligation she may incur on her own behalf." This express exclusion of liability on the part of the husband would seem to have been unnecessary and to have been inserted only *ex abundanti cautela*.

The Act does not expressly deal with a wife's capacity to contract with her husband and there is nothing in the Scottish

³⁸ National Assistance Act, 1948, s. 43 (2). In such an action the husband may avail himself of any defences open to him at common law—*Corcoran v. Muir*, 1954 J.C. 46, following *National Assistance Board v. Wilkinson* [1952] 2 Q.B. 648.

³⁹ *Adair v. Adair*, *supra*.

⁴⁰ See *Adair v. Adair*, 1924 S.C. 798.

⁴¹ But see Fraser, *Treatise on Husband and Wife* (2nd ed.), i.837.

statutes corresponding to section 12 of the Married Women's Property Act, 1882. Lingering notions of the fictional unity of the spouses led to observations from the Bench that married persons cannot contract with one another.⁴² The matter has not yet come before the Inner House of the Court of Session, but it has been decided in the Outer House that a wife may sue her husband in respect of a contract between them.⁴³ This decision is being followed in the Sheriff Courts.⁴⁴

Quasi-delicts

The common law of Scotland, differing in this respect from that of England, held that a husband is not liable for his wife's quasi-delicts, unless he participated in them or in some way lent his authority to her actions.⁴⁵ Again, and also in contrast to the position in England, a wife might herself be sued for her own quasi-delicts without her husband although, unless she had separate estate of her own, she might not be worth suing.⁴⁶ The reports do not disclose that any actions for reparation were raised by one spouse against another prior to the Married Women's Property Acts.⁴⁷ The *jus mariti* and the doctrine of unity, it may be surmised, were regarded as insuperable obstacles. The matter first came before the courts in 1903 in the case of *Young v. Young*.⁴⁸ The Married Women's Property (Scotland) Act, 1881, had abolished the *jus mariti* but contained no provision corresponding to section 12 of the Married Women's Property Act, 1882. The question, therefore, depended upon the common law. In concluding that such actions were incompetent the court placed much reliance upon *Philips v. Barnet*,⁴⁹ which was described as "resting upon the very intelligible ground that so long as the marriage is undissolved the husband and wife are one person in law."⁵⁰ A hint, however, was dropped that such actions were in any case to be discouraged as not conducing to domestic peace. Some twenty-five years later it was argued in *Harper v. Harper*⁵¹ that the 1920 Act, which again made no explicit reference to the right of spouses to raise delictual actions against each other, had displaced the *ratio* of *Young v. Young*. The court in effect conceded that it had, but came to the same conclusion on the ground of public policy. This may be the rationalisation of the rule, but would

⁴² *Harper v. Harper*, 1929 S.C. 220, *per* Lord Anderson at p. 226.

⁴³ *Horsburgh v. Horsburgh*, 1949 S.C. 227.

⁴⁴ *Aitken v. Aitken*, 1954 S.L.T. (Sh.Ct.) 60.

⁴⁵ *Milne v. Smiths* (1892) 20 R. 95.

⁴⁶ *Milne v. Smiths*, *supra*, and cases there cited.

⁴⁷ *Harper v. Harper*, *supra*, *per* Lord Moncrieff, at p. 221.

⁴⁸ (1903) 5 F. 330.

⁴⁹ (1876) 1 Q.B.D. 437.

⁵⁰ *Young v. Young*, *supra*, *per* L.P. Kinross at p. 330.

⁵¹ *Supra*.

appear to be no adequate justification for it. It leads in Scotland to the same anomalies which have evoked criticism in England.⁵²

Rights arising on the dissolution of the marriage

By the death of either spouse.—If, as Professor Kahn-Freund points out,⁵³ it does not greatly matter during a normal healthy marriage who is the legal owner of the family property, the question necessarily assumes importance on its dissolution. It is, then, not without significance that, although the other vestiges of the old Scottish community of goods were removed by the Married Women's Property Acts, the legal rights of spouses in each other's estates were left intact. They could even be said to have been extended to meet the changed situation of a married woman. The natural complement of the wife's right to retain her own moveable estate was the provision that the husband should take the same share and interest in her moveable estate as is taken by a widow in her deceased husband's moveable estate.⁵⁴

Of these legal rights the most important today is *jus relictæ*. There has been some controversy as to the nature of the right, whether it is a *jus maritale*, or a *jus successionis*, or a mere claim for debt.⁵⁵ The institutional writers described it as arising on the division of the goods held in communion.⁵⁶ The community theory, however, has been rejected and it is said that the right is one in the nature of a debt which falls to be ascertained at the date of death.⁵⁷ Yet it is not an ordinary claim for debt: it may not be deducted from the deceased's estate in computing its value for estate duty purposes; it is postponed to the claims of the deceased's creditors; and for the purposes of private international law it is regarded as a right of succession.⁵⁸

A surviving spouse has a claim to her or his legal rights of *jus relictæ*, *jus relictî*, terce and courtesy whether or not the predeceasing spouse left a will. A testator cannot defeat his or her spouse's legal rights by will, and the will takes effect only after the spouse's legal rights have been met. The election, however, to take legal rights may cause a spouse to forfeit his or her testamentary provisions or, if not, he or she may be entitled to take them only after making equitable compensation to the estate. A spouse may renounce his or her legal rights and a clause of renunciation is a common feature of marriage contracts. It is immaterial that the consideration for the discharge turns

⁵² *Cameron v. Glasgow Corporation*, 1935 S.C. 533 and 1936 S.C. (H.L.) 26.

⁵³ W. Friedmann (ed.), *Matrimonial Property Law*, pp. 267 *et seq.*

⁵⁴ Married Women's Property (Scotland) Act, 1881, s. 6.

⁵⁵ See Walton on *Husband and Wife* (3rd ed.), p. 236.

⁵⁶ Stair, iii.8.43; Erskine, ii.9.19-21; Bell, para. 1574.

⁵⁷ *Cameron's Trustees v. MacLean*, 1917 S.C. 416.

⁵⁸ *Trevelyan v. Trevelyan* (1873) 11 M. 516, especially *per* L.J.C. Moncreiff at p. 519.

out to bear no relation to the value of the rights to which the spouse would have been entitled otherwise. The existence of legal rights "does not deprive either the husband or the wife of the power to alienate their estates gratuitously by irrevocable divestiture during the subsistence of the marriage, even though that may have the effect of leaving no estate for the legal rights to operate upon."⁵⁹ A husband may defeat or diminish his widow's claim to *jus relictæ* by transforming his moveable estate into heritage, by utilising it to purchase annuities terminating on his death, or by conveying the estate to trustees reserving his own liferent. This is not a very satisfactory state of affairs. It is derisory to establish "indefeasible" legal rights if it is a simple matter to defeat them. In several hard cases attempts were made to establish a doctrine of fraud upon legal rights, but without success.⁶⁰ The absence of such a doctrine can only be accounted a major defect in our law.⁶¹

When the deceased spouse's estate was a large one, the legal rights accorded to the survivor were a reasonable provision. In smaller estates, however, the whole income might be required for the surviving spouse's maintenance and the position was less satisfactory. In 1911, the Intestate Husband's Estate (Scotland) Act gave to the widows of Scottish intestates claims corresponding to those set up in England by the Intestates' Estates Act, 1890. Analogous rights in favour of the husbands of intestate wives were created by section 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940. A widow's legal rights together with the sum of £500 may have constituted a satisfactory provision in 1911, but it was not so after the First World War. This was recognised in Scottish legal circles, but successive governments postponed consideration of the question. It was ultimately referred to a Committee of Inquiry under the chairmanship of Lord Mackintosh, which reported in December 1950.⁶² The Committee recommended the retention of the existing system of legal rights with this exception, that courtesy should be cut down to correspond in its extent with terce. They also recommended that, where an intestate leaves a surviving spouse and no issue, the spouse should get the furniture and a preferential claim to £5,000; and further that where an intestate leaves a surviving spouse *and* issue, the former should get the furniture and a preferential claim to £1,000. The surviving spouse would also be entitled to legal rights out of the remaining estate. No steps have yet been taken to implement

⁵⁹ *Scott v. Scott*, 1930 S.C. 903, *per* Lord President J. A. Clyde at p. 919.

⁶⁰ Fraser, *supra*, ii, p. 1008.

⁶¹ In view of the provisions of the Inheritance (Family Provision) Act, 1938, and the Intestates' Estates Act, 1952, it would seem that the same problem will have to be faced by English law.

⁶² Cmd. 8144/1951.

the report and the passage of time has already altered the real value of the sums suggested.

By the divorce of either spouse.—On divorce for adultery or desertion the guilty spouse forfeits under the common law any claim to conventional provisions *intuitu matrimonii* arising in his or her favour and to legal rights in his or her spouse's estate. The innocent spouse may at once claim payment of his or her legal rights as if the other were dead. He or she may also claim payment of conventional provisions made either by the guilty spouse or by some other person on his or her behalf.⁶³ Thus an innocent wife may claim *terce* and *jus relictæ*; but an innocent husband may claim *courtesy* only. *Jus relictæ* is a statutory creation and applies only to "the husband of any woman who may die." The Divorce (Scotland) Act, 1938, provides that a decree of divorce granted on any of the grounds specified in the Act, except incurable insanity, should have the same effect upon the property rights of the spouses as a decree on the ground of the defender's adultery. A decree of divorce on the ground of the incurable insanity of the defender has no effect on property rights, although the pursuer may be ordered at the discretion of the court to pay a capital sum or periodical allowance for the maintenance of the defender or the children of the marriage. Apart from this provision Scots law does not concede to either spouse maintenance after the dissolution of the marriage by divorce.⁶⁴ The spouse, however, in whose custody the children of the marriage are left may be granted an alimentary allowance for their maintenance and education.⁶⁵

The absence of provision for payment of a maintenance allowance has occasioned some criticism in Scotland. Although a guilty husband may have small capital resources, he may have a substantial income. Moreover, legal rights lend themselves to evasion. The Mackintosh Committee, after considering the question and examining the system in operation in England, have recommended that legal rights arising on divorce should be abolished and the court empowered to provide for the innocent spouse by payment in its discretion either of a periodical allowance or of a capital sum.

Marriage Contracts

In Scotland it has always been possible for persons contemplating marriage to contract out of the effects which the marriage would otherwise have upon their proprietary relations. Marriage contracts, however, have never been common outside a restricted

⁶³ *Fortington v. Lord Kinnaird*, 1942 S.C. 239.

⁶⁴ *Stewart v. Stewart*, *supra*.

⁶⁵ *Dunn v. Matthews* (1842) 4 D. 454.

social class and the Scottish solicitor is now less preoccupied with making than with finding means to break marriage contracts.

Formerly the wife could not consent to the alteration of the trust provisions in her favour because of the operation of the principle known as the wife's matrimonial trust protection. This rested upon the diminished capacity of the married woman under the common law. To protect her, as it was said, from the importunity of her husband and her natural desire to please him, she was prevented from consenting to the alteration of the trust during the subsistence of the marriage "as if her will and mind were in abeyance."⁶⁶ But since the Married Women's Property Acts, the will and mind of a wife are, even in legal theory, no longer in abeyance and it was held in *Beith's Trustees v. Beith*⁶⁷ that the principle of the wife's matrimonial trust protection no longer obtained. But other factors may operate to make it impossible to terminate the trust. It was usual to stipulate in marriage contracts that the liferent provisions contained in them were alimentary. Such a stipulation places the beneficiary's income out of the reach of his creditors by making it unassignable. This may prevent the trust from being wound up. Normally a person cannot make an alimentary provision in his or her own favour; but an exception to this is recognised when a woman creates an alimentary provision in her own favour in her marriage contract. This is the Scottish equivalent to the recently abolished "restraint upon anticipation" in England. It was formerly thought that the condition of this exceptional power to create an alimentary provision in the granter's own favour was the irrevocability of the provision; but in *Sturgis's Trustee v. Sturgis*⁶⁸ a widow was permitted to renounce her alimentary liferent in favour of the persons in whom the fee had vested.

CONCLUSION

This survey makes it clear that there is little trace in the Scottish cases of a "new equity" in property questions between husband and wife. Until very recently the courts were reluctant to depart from precedents dating from the period when, on marriage, the husband became the proprietor of his wife's moveables.⁶⁹ Moreover, there was no statutory provision in Scotland corresponding to section 17 of the Married Women's Property Act, 1882. In its absence, the Scottish judges hesitated to depart from the strict considerations of law which govern proprietary relations between strangers. Their application, as has been shown, tended to favour the husband.

⁶⁶ *Menzies v. Murray* (1875) 2 R. 507, per Lord Neaves at p. 517.

⁶⁷ 1950 S.C. 66.

⁶⁸ 1951 S.C. 637.

⁶⁹ See, for example, *Horsburgh v. Horsburgh*, 1949 S.L.T. 355.

Recently, however, it has been realised that the principles upon which many of the old decisions were based are inconsistent with the changed position of married women resulting from the Married Women's Property Acts. In the context of this legislation the late Lord Cooper of Culross, then Lord President of the Court of Session, has remarked: "If it is manifest that the *ratio decidendi* upon which a previous decision has rested has been superseded or invalidated by subsequent legislation, or from other like cause, that *ratio decidendi* ceases to be binding."⁷⁰ The courageous application of this principle would do much to remove anomalies; but it is thought that rather more than that is required to make the law reflect current social conceptions of the family. Here again a remark made by Lord Cooper is of special significance: "My impression," he said, "is that the wider aspect of the present problem may yet have to be solved by reintroducing in a limited form the old conception of a *communio bonorum* so far as relates to the common home and its maintenance."⁷¹ It is to be hoped that this suggestion will be given the serious consideration that it deserves.

A. E. ANTON.*

⁷⁰ *Beith's Trs. v. Beith*, *supra*, at p. 70.

⁷¹ *Preston v. Preston*, *supra*, at p. 257.

* M.A., LL.B.; Lecturer in Law, University of Aberdeen.

NULLITY JURISDICTION IN NORTHERN IRELAND

THE law in regard to matrimonial disputes in Ireland, as in England, was formerly administered exclusively by the ecclesiastical courts, at one time by Church dignitaries, and afterwards under delegated powers by ecclesiastical lawyers.¹ Their jurisdiction extended to divorces *a mensa et thoro*, suits for nullity of marriage, for restitution of conjugal rights and for jactitation of marriage. These courts had no power to dissolve a marriage, and as they merely acted *in personam* their jurisdiction was founded on the residence of the parties (or at least on the residence of the respondent) within the diocese in which the court had jurisdiction. They were restricted by the civil law to their prescribed area of operation in England by the Statute of Citations 1531-1532 (23 Hen. 8, c. 9) which, however, did not apply to Ireland, but Canon 54 of the Church of Ireland Canons of 1634 contained a similar provision when it stated that the Ecclesiastical Courts should pass sentences in matrimonial causes concerning "them only that are then dwelling under their jurisdiction."

On the disestablishment of the Church of Ireland all jurisdiction of Ecclesiastical Courts in matrimonial matters was taken away and transferred to a Court for Matrimonial Causes and Matters by the Matrimonial Causes and Marriage Law (Ireland) Act, 1870, and section 13 of this Act (corresponding to section 22 of the English Act of 1857) provided that in all suits and proceedings the said court should proceed and act and give relief on principles and rules which, in the opinion of the said court, should be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts of Ireland had theretofore acted and given relief. These two sections remain unrepealed, and as regards Northern Ireland the jurisdiction exercisable by virtue of the Act of 1870 is now exercisable by the High Court of Justice in Northern Ireland.

The Matrimonial Causes Act (Northern Ireland), 1939, which for the first time made it possible in Northern Ireland for a person to obtain a divorce *a vinculo matrimonii* by petition in the Queen's Bench Division² (on grounds identical to those contained in section 2 of the English Act of 1937), by section 9 enumerated new grounds for decrees of nullity of marriage (identical to those enumerated in section 7 of the English Act).

¹ See the illuminating judgment of Andrews L.C.J. in *Mason v. Mason* [1944] N.I. 134 on this subject.

² Since 1897 the Probate and Matrimonial Division has been amalgamated with the Queen's Bench Division.

It is in the light of this extremely similar development of the law of nullity in the two countries that the recent case of *Addison (otherwise McAllister) v. Addison*³ will repay study.

The facts were that a ceremony of marriage was celebrated in Northern Ireland between the petitioning wife who was domiciled and resident in Northern Ireland and the respondent who was a serving soldier domiciled in England. The parties went to live in England in 1946 on the demobilisation of the respondent. After four days they separated and the petitioner returned to Northern Ireland while the respondent continued to live in England. In 1952 the petitioner presented a petition to the High Court in Northern Ireland seeking a decree of nullity on the ground of the impotency of the respondent, or alternatively on the ground of his wilful refusal to consummate the marriage. The petition was served on the respondent in England and although no appearance was entered on behalf of the respondent certain correspondence ensued between the solicitors for the parties which showed that the respondent did not intend to contest the suit but wished to have the marriage terminated.

Lord MacDermott L.C.J. was satisfied on the medical evidence that there was no wilful refusal on the part of the respondent, but that at the date of the ceremony and thereafter he was incapable of consummating the marriage by reason of impotence, but he directed an argument on the question whether there was jurisdiction to entertain the petition and annul the marriage.

Counsel for the petitioner relied on four alternative propositions which he argued would confer jurisdiction on the court. They may be stated as follows—

1. The residence of the petitioner in Northern Ireland.
2. Even if that was insufficient the respondent had by his conduct submitted to the jurisdiction and had thereby made the court as competent as it would have been had he too been resident or domiciled in Northern Ireland.
3. The effect of Order 70, r. 7 (i) (which allowed the respondent to be served in England) was to give jurisdiction in this case.
4. Apart from any other consideration, the court had jurisdiction because the marriage was celebrated in Northern Ireland.

The first proposition involved an inquiry as to whether it would have prevailed in the days of the Ecclesiastical Courts, and, if not, had the course of authority since been such as to establish it. The learned judge came to the conclusion that there was no authority in England or in Ireland to warrant the view that the Ecclesiastical Courts were at any time prepared to embrace the proposition under discussion and to find jurisdiction where (as

³ [1955] N.I. 1.

here) the respondent was ordinarily resident outside the territorial limits of the court concerned. Several fairly recent cases were cited to the court in support of the suggestion that the law had moved away from the rigid requirement of the Ecclesiastical Courts, but such cases as *Roberts v. Brennan*⁴ and *Robert v. Robert*⁵ had been disapproved by the Court of Appeal in England in *De Reneville v. De Reneville*,⁶ whilst the *ratio decidendi* in *Hussein v. Hussein*,⁷ would appear to be that jurisdiction was accepted on the basis that the marriage had been celebrated in England.

Whilst the learned judge was not bound by the English decision of *De Reneville v. De Reneville* he found very convincing that part of the decision which may be summed up in the words of Lord Greene M.R. at p. 118, "that a wife who is resident but, *ex hypothesi*, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and to convenience."

A case which was not cited to the Northern Ireland Court was *Shaw v. Shaw*⁸ a decision of the British Columbia Court of Appeal which decided that the courts of British Columbia have no jurisdiction on the petition of the wife to decree nullity of marriage on the ground of impotency of the husband when the wife alone is resident in the Province and the husband is not resident or domiciled in the Province and the marriage was celebrated out of the Province.

It is of interest to note that in the sentence preceding the above quotation the Master of the Rolls was careful to express no opinion upon the question whether residence of both parties within the jurisdiction was sufficient. In Northern Ireland Andrews L.C.J. in *Mason v. Mason*⁹ in a memorable judgment¹⁰ decided "that the bona fide residence in Northern Ireland of both petitioner and respondent . . . confers upon this court a jurisdiction to determine the validity or invalidity of a marriage." In that case Mr. MacDermott (as he then was) as the Attorney-General was called upon to assist the court with argument.¹¹

With regard to the second proposition, which amounted to a statement that jurisdiction could be based on submission, the learned judge did not find it necessary definitely to decide the

⁴ [1902] P. 143.

⁵ [1947] P. 164.

⁶ [1948] P. 100.

⁷ [1938] P. 159.

⁸ [1946] 1 D.L.R. 168.

⁹ [1944] N.I. 134.

¹⁰ For an appreciation of this judgment see a note by J. H. C. Morris in (1945) 61 L.Q.R. 341. Since this article was written Willmer J. has reached a similar decision in *Ramsay-Fairfax v. Ramsay-Fairfax* [1955] 3 W.L.R. 188 (affirmed by the Court of Appeal [1955] 3 W.L.R. 849). *Mason v. Mason* and *Addison v. Addison* were not cited.

¹¹ As counsel for the Chief Crown Solicitor who performs the functions of Queen's Proctor in Northern Ireland.

matter because he decided as a fact that there was not even appearance under protest.¹²

The third proposition turned on the provision made by Ord. 70, r. 7 (i) that "a petition, notice or other document in matrimonial cause or matter may be served out of the jurisdiction without leave." This is similar to Rule 10 of the Matrimonial Causes Rules, 1950. This power is not a new one for it would appear that the Ecclesiastical Courts enjoyed some such power, but it is difficult to see how this mere matter of substituted service could be said to be a separate ground of jurisdiction. Jurisdiction must exist in the court of the forum before the question of service becomes relevant and Lord MacDermott was content to rely upon the judgment of Horridge J. in *Graham v. Graham*,¹³ where it was held that the fact of service itself gave no jurisdiction in the case of proceedings issued without jurisdiction.

That brings us to the last and most important proposition that this court has jurisdiction on the sole ground that the marriage was celebrated in Northern Ireland. It is in this part of his judgment that the Lord Chief Justice demonstrates that very clear grasp of legal problems already revealed in his judgments in the House of Lords.

The decision of the House of Lords in *Salvesen v. Administrator of Austrian Property*¹⁴ marks a turning point in the history of nullity jurisdiction in England. Their Lordships decided that a decree of nullity pronounced by the court of the domicile of both parties is universally binding. They did not decide that the court of the domicile had an exclusive jurisdiction although Lord Phillimore did state *obiter* that in his opinion the court of the domicile was the only court competent to pronounce a decree of nullity. Lord Haldane was however at pains to make the limited nature of the issue clear when he said¹⁵: "The real question is simply whether the court of the domicile was competent to dispose conclusively and finally of the question before it. If so it does not matter in law whether it had an exclusive jurisdiction."

The views of their Lordships influenced Bateson J. when he was faced with the case of *Inverclyde v. Inverclyde*¹⁶ and in particular the statement made *obiter* and in parenthesis by Lord Phillimore that "... the Wiesbaden Court was the only competent court for these parties."¹⁷ Bateson J. was asked to annul a marriage on the ground of the impotence of the respondent. The parties were domiciled in Scotland and the petitioner was resident in England. The respondent had places of residence both in England and Scotland and appeared under protest disputing

¹² See the facts.

¹³ [1923] P. 31, 37.

¹⁴ [1927] A.C. 641.

¹⁵ *Ibid.*, 652.

¹⁶ [1931] P. 29.

¹⁷ [1927] A.C. at 671.

the jurisdiction of the court. Bateson J. stated at p. 41 that "the marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment *in rem* binding on all the world there can be no jurisdiction in this court unless the parties are domiciled in this country."

In the undefended case of *Easterbrook v. Easterbrook*¹⁸ Hodson J. (as he then was) said that he was unable "with all respect to Bateson J. to see the distinction for the purpose of jurisdiction which he appears to have drawn in *Inverclyde v. Inverclyde*, between voidable and void marriages." In view of this difference of judicial opinion when the same point came for discussion in *Hutter v. Hutter*¹⁹ there was a full examination of all the authorities by Pilcher J. who refused to follow Bateson J. and held that with respect to the court's jurisdiction there was no difference between void and voidable marriages.

The British Columbia Court of Appeal in *Shaw v. Shaw*²⁰ also refused to accept the distinction between void and voidable marriages for the purposes of jurisdiction, Sidney Smith J.A. saying: "Giving the matter the best consideration I can, I think the conclusion of Pilcher J. is correct and so also is the reasoning upon which it is founded."²¹ A further Canadian case *Gower v. Starrett*²² is also relevant because Farris C.J.S.C., who as the judge of first instance in *Shaw v. Shaw* had accepted the views of Bateson J. and was overruled by the Court of Appeal, now again sitting as a judge of first instance in a nullity petition based on an alleged bigamous marriage says: "I have now very carefully studied the reasons given by the Appeal Court and the cases therein cited . . . and with the greatest respect to our Appeal Court I do not hesitate to say that in my opinion their judgment in respect thereto is correct and that mine as to domicile in the *Shaw v. Shaw* case was wrong." He also states in the beginning of his judgment: "In order that the Bar of this Province may have the law in respect thereto clearly defined I have deemed it advisable to confer with my brother judges. They unanimously agree, after a complete examination of this judgment and full consideration thereof, that the findings in this case express the law as they will apply it in like cases until such time as law is otherwise cited by a Court whose judgment is binding on this Court" (page 854). The case decided that the elements giving jurisdiction in a nullity action are the same whether the marriage is void *ab initio* or voidable only.

Then came the case of *De Reneville*²³ in which occurs this

¹⁸ [1944] P. 10, 11.

¹⁹ [1944] P. 95.

²⁰ [1946] 1 D.L.R. 168.

²¹ *Ibid.*, 179.

²² [1948] 2 D.L.R. 853, 858.

²³ [1948] P. 100, 110.

sentence in the judgment of Lord Greene M.R.: "So far as English law is concerned there is a clear distinction between void and voidable marriages." Whilst approving of the distinction drawn by Bateson J. for the purposes of jurisdiction, the Court of Appeal did not express an opinion as to the correctness of the actual decision in *Inverclyde v. Inverclyde*, for that case and *Hutter v. Hutter* were cited without any clear disapproval of either. The *ratio decidendi* of the *De Reneville* case as far as jurisdiction was concerned can be stated simply, that jurisdiction for nullity cannot be founded on the residence of the petitioner alone. However in *Casey v. Casey*²⁴ the Court of Appeal in England, at least by implication, supported the *Inverclyde* decision and drew the same clear distinction between void and voidable marriages. The facts of *Casey v. Casey* correspond very closely with those of the present Northern Ireland case and the actual decision in the English case was that the mere fact that the ceremony of marriage took place in England does not of itself give the court jurisdiction to entertain a suit for nullity where the marriage is alleged not to be void *ab initio* but merely voidable.

Lord MacDermott was, of course, not bound by any of these English decisions but he made it clear that such decisions command great respect in this jurisdiction and are not disregarded without very serious consideration. However he felt that there were compelling reasons which drove him to the conclusion that the *Inverclyde* case was wrongly decided. The reasons for this opinion fall under two heads.

The first being simply that *Salvesen's* case could not support the *Inverclyde* decision. It would be most unlikely that Lord Phillimore intended his remarks regarding the exclusive jurisdiction of the Wiesbaden Court to be taken as laying down, so casually, any new general principle and in any case such remarks cannot be held to be part of the *ratio decidendi* of the case.

The second heading may be called the historical one. Is there any historical basis for the statement that whilst our courts are heirs to the Ecclesiastical Courts and proceed and act and give relief on the principles and rules nearly conformable to those of the Ecclesiastical Courts, they can nevertheless develop the distinction between void and voidable marriages and assimilate the process whereby voidable marriages are terminated to that followed in cases of dissolution? Lord MacDermott made it clear that he was not in principle opposed to such a change saying²⁵: "Such a change would have much to commend it. It would tend to reduce the possibility of conflicting decisions and it would make for greater certainty. . . . But are the courts free to make this change?"

²⁴ [1949] P. 420.

²⁵ [1955] N.I. at 21.

Lord Greene in a well-known passage in *De Reneville v. De Reneville*²⁶ said: "It is perhaps unfortunate that a form of decree which was appropriate when a marriage was regarded as indissoluble and could only be got rid of by decreeing that it had never taken place is still used indiscriminately in the cases of both void and voidable marriages." However unfortunate it might be the decree of nullity in the case of a void and voidable marriage is still today the same as it always was. The Ecclesiastical Courts made no distinction in their decrees of nullity, even a voidable marriage was annulled *ab initio*.

The suggestion that jurisdiction over voidable marriages should be based on domicile is also without historical foundation, because in 1857 when nullity suits first became triable in England by the civil courts the doctrine of domicile as the test of jurisdiction was only in course of development, even in cases of dissolution of marriage as is instanced by *Brodie v. Brodie*²⁷ where "bona fide residence of the husband in this country not casually or as a traveller" was held to found jurisdiction of the court to dissolve his marriage. Not until 1895 in *Le Mesurier v. Le Mesurier*²⁸ was the principle for the first time formulated by a court of supreme authority that the domicile for the time being of the married pair afforded the only true test of jurisdiction in cases of dissolution. If the change which has been advocated is to take place then it ought to be introduced by legislation because it is contrary to the historical background of the courts.

The position in Northern Ireland is still clearer, as the courts had no power to dissolve a marriage until the Matrimonial Causes Act of 1939, and previously the problem of domicile or residence was not a real one. In the words of Lord MacDermott²⁹: "Had he been sitting here instead of in England when he decided *Inverclyde* I think Bateson J. would have had great difficulty in reaching the conclusion he did. He could not have assimilated the process of annulling a voidable marriage to that of dissolving a valid marriage because the only form of dissolution then possible in Northern Ireland was that effected by an Act of Parliament. He would have been exercising the powers of the Ecclesiastical Courts without any concurrent jurisdiction to appeal to by way of analogy." Nor did the 1939 Act alter the position for although section 9 introduced new grounds for nullity it reiterated that all proceedings under that Act should be "as nearly as may be conformable to the principles . . . before the commencement of this Act."

The learned judge then considered whether jurisdiction can be supported solely on the ground that the court is the court of

²⁶ [1948] P. 100, 110.

²⁷ (1861) 2 Sw. & Tr. 259, 263.

²⁸ [1895] A.C. 517.

²⁹ [1955] N.I. at 22.

the place of celebration. Cases like *Chichester v. Donegal*³⁰ and *Dalrymple v. Dalrymple*³¹ were decided by the Ecclesiastical Courts in manner favourable to the point under discussion. In *Linke v. Van Aerde*³² Gorell Barnes J. stated that "the marriage contract was entered into here and on that ground the court was asked to deal with it." The Irish case of *Sproule v. Hopkins*³³ also clearly accepts jurisdiction on the basis that the contract of marriage was entered into and the marriage celebrated in Ireland. Scottish cases such as *MacDougall v. Chitnavis*³⁴ and *Prawdzc-Lazarska v. Prawdzc-Lazarski*³⁵ are evidence that jurisdiction has been exercised on the ground that the marriage was celebrated within the forum in Scotland. The Canadian case of *Gower v. Starrett*, already referred to, is authority on the same point.

In the light of these cases it must be accepted that the court of the ceremony has, as such, a jurisdiction to annul. But ought such a jurisdiction to be confined to matters of form, to matters in which the ceremony is attacked? Such a restriction would be unreasonable because it would mean that some of the many matters which make a marriage void would be within the court's competence whilst others, such as bigamy, would be excluded from this jurisdiction.

It could have been argued in this case that the court of the ceremony ought to have jurisdiction in any case when impotence is the ground upon which nullity is sought because in the case of impotence the respondent brings to the ceremony a permanent disability which prevents the consummation of the ceremony.³⁶ However Lord MacDermott was content to rely on the point that impotence was the only ground originally for a voidable marriage, and there was no sound basis for any distinction between void and voidable in Northern Ireland before the 1939 Act, and as the new grounds created by this Act are to be treated "in respect of the same or like matters before the commencement of this Act" (s. 28 (i)) the same ought to apply to them.

If the principles of the Ecclesiastical Courts are to be followed then any such distinction between void and voidable marriages in relation to the jurisdiction for annulment must be resisted, and until Parliament sees fit to change the law then in the words of Lord MacDermott³⁷: "The directions of section 13³⁸ would be better met by holding that the court of the ceremony has a complete jurisdiction in nullity cases rather than a jurisdiction which is exercisable if the marriage is void but not if it is voidable."

³⁰ (1822) 1 Add. 5.

³¹ (1811) 2 Hag Con. 54.

³² (1894) 10 T.L.R. 426.

³³ [1903] 2 I.R. 133.

³⁴ 1937 S.C. 390.

³⁵ 1954 S.C. 98.

³⁶ See *The Formation and Annulment of Marriage*, by Joseph Jackson at p. 210.

³⁷ [1955] N.I. at 31.

³⁸ 1870 Act—same as s. 22 of the English Act, 1857.

It might be argued that the *ratio decidendi* of *Addison v. Addison* is simply that the court of the ceremony has jurisdiction to annul a marriage on the ground of the impotency of the respondent and that it is not authority for anything further, but it was clearly the intention of the learned judge that the decision should be that there is no ground for distinguishing between a void and voidable marriage and that all marriages may be annulled by the court of the place of ceremony. Further there is no suggestion in the judgment that other courts such as the court of the domicile shall not have concurrent jurisdiction.

"The concept of an exclusive jurisdiction in matters affecting status, which is based on domicile still has its attractions despite the problems it has encountered in recent years." These words of Lord MacDermott, however interesting they may be, must now surely be relegated to the realm of "pipe-dreams" because in recent years there has been a virtual abandonment of the test of domicile altogether in favour of the test of "ordinary residence" both in the case of proceedings for divorce and for nullity.³⁹ There is of course the proviso that this new test shall not operate if the husband is domiciled in any other part of the United Kingdom.

Underlying all this however there are matters of serious import and in *Addison v. Addison* the learned judge was at pains to point out that any decision he made must be distinguished from considerations of conflict and conclusiveness. There are now two matters concerning nullity jurisdiction in Northern Ireland which merit urgent attention. The first is that the recent enactments⁴⁰ of the English Parliament and of the Northern Ireland Parliament have along very similar lines made nullity and divorce more easily obtainable by a wife and jurisdiction is not necessarily based on domicile, yet as far as the matter of the recognition of judgments made in the different legal units of the United Kingdom is concerned no change has been provided for.⁴¹ To receive recognition a judgment concerned with status must be a judgment of the court of the domicile unless that court by way of "*renvoi*" transmits the power to change the status of its domiciliaries to courts of another country and may recognise such decrees of those courts as equal in validity to those of its own courts as was seen in *Armitage v. Att.-Gen.*⁴² What then of the decrees of the English courts or the Northern Ireland courts given under the authority of the new legislation—are they not to receive mutual

³⁹ See s. 1 (1) (a) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951, which is similar to s. 18 (1) (b) of the [English] Matrimonial Causes Act, 1950.

⁴⁰ In Northern Ireland—Matrimonial Causes Act, 1939.

Law Reform (Miscellaneous Provisions) Act, 1951.

In England—Matrimonial Causes Act, 1937.

Matrimonial Causes Act, 1950.

⁴¹ See Graveson, 3 I.C.L.Q. 375-378, where he discusses four remedies for this evil.

⁴² [1906] P. 135.

recognition? Whilst there are signs⁴³ that the judges are not withholding such recognition, it is not right and proper that such an important aspect of our public policy should be left in this unsettled state. The Parliaments concerned should have prepared for this eventuality and it is still their duty to do so by means of an Act providing for mutual recognition of status judgments given under similar legislation in the United Kingdom.

The second matter is that now we have at least two Northern Ireland decisions on status matters,⁴⁴ which are either contrary to the prevailing judicial opinion in England or about which judicial opinion there is unsettled. This divergence is in some ways a healthy one and the Northern Ireland courts are not in isolation in these matters because the courts of British Columbia have independently come to the same conclusion; however there still remains for the future yet another aspect of the problem of international recognition and conclusiveness. Perhaps the time has come for the United Kingdom to seek uniformity on matters of status amongst the legal units contained within this political group, and then to sponsor an International Convention designed to establish a uniform basis for jurisdiction in these important matters.

There can be no doubt that the very carefully thought out judgment of Lord MacDermott in the present case will receive very respectful attention amongst the judiciary and jurists throughout the English-speaking world.

D. COLWYN WILLIAMS.*

⁴³ *Carr v. Carr* [1955] 1 W.L.R. 422.

⁴⁴ *Mason v. Mason and Addison v. Addison*.

* Lecturer in Law at the Queen's University, Belfast.

NOTES OF CASES

WHO MAY BE DESERTED

FOUR recent decisions, hinging on the reactions of a wife when her husband left her, seem at first sight difficult to reconcile with each other. Indeed, in the latest of these decisions,¹ one member of the Court of Appeal² said that he had considerable doubt whether the first two of the cases in question³ were rightly decided. The other two members of the court⁴ thought that the earlier cases were distinguishable, but might need careful consideration by the Court of Appeal on a future occasion.

In *Beigan v. Beigan*, the husband had committed adultery which his wife had condoned, but when he tried to induce her to accept into their home the child born of the adulterous union, she refused. The marriage deteriorated, the husband frequently threatened to leave, entertained groundless suspicions of his wife's adultery, and insisted that she should return to the house by 9.30 p.m. One evening when she was visiting a woman friend he caused their son to telephone to confirm that she was indeed there. A violent quarrel took place when she returned home, the husband repeated his threat to leave, and she replied: "If you go now, you do not come back again." Nevertheless in the middle of the night he left the house, threatening that he would strip it of all furniture. When he returned, either the next day or a day or two later, the locks on the door had been changed and although he gained entry to the house, the wife refused to have him back. The Court of Appeal unanimously confirmed the decree nisi granted to her at first instance on the grounds of her husband's adultery which, although condoned, had been revived by his subsequent departure. The decree had also been based on the husband's desertion, and although this was not confirmed on appeal, all the members of the court affirmed that, if necessary, they would also have been prepared to find the husband guilty of desertion, which had not ceased to run either because of the wife's warning that if he went he could not return, or her attempt to exclude him from the house and her refusal to take him back. The court referred to the fact to which the Report of the Royal Commission on Marriage and Divorce recently drew attention, that in England, unlike Scotland, the

¹ *Beigan v. Beigan* [1956] 3 W.L.R. 281, C.A.; 2 All E.R. 630; [1956] P. 313.

² Since this note was written there has been a further decision by the Court of Appeal in *Gibson v. Gibson* [1956] 7 C.L. 48 and *The Times*, July 18, 1956.

³ Denning L.J. [1956] 3 W.L.R. 281, 284.

⁴ *Barnett v. Barnett* [1955] P. 21; 2 W.L.R. 229; [1954] 3 All E.R. 689, and *Fishburn v. Fishburn* [1955] P. 29; 2 W.L.R. 236; 1 All E.R. 230.

⁵ *Birkett L.J.* [1956] 3 W.L.R. 281, 288, and *Parker L.J.*, *ibid.*, p. 290.

deserted party need not prove that throughout the three-year period of desertion she has been "willing to adhere" to her husband. Denning L.J. thought that, if a wife locks the door against her husband, it does not automatically terminate his desertion, and added: "It all depends on whether it has any effect on the husband by preventing him from seeking a reconciliation." This, of course, is on the assumption that the initial act of departure has been found to constitute desertion, and not mere separation by consent, a point which it will be submitted may well have arisen in at least one of the earlier cases which caused difficulty to the court.

In reaching their decision, the Court of Appeal approved and followed a decision of the Divisional Court in *Bevan v. Bevan*.⁵ Here the wife, from her earnings of £4 10s. per week, had handed her husband a total of £64 at the rate of £3 a week for the hire-purchase instalments on their furniture. Having diverted the £64 to his own pleasures, the husband announced that his things were packed, he was leaving her and the furniture was being returned. The wife persuaded her father to call at her husband's place of work to find out what had happened, and in this and subsequent interviews the husband offered no explanation of what he had done with her money or why he was leaving her, expressed no regret for what he had done but inquired if she was prepared to buy the furniture over again. The wife's reply to the latter inquiry was that she did not want to see him again and wanted a divorce. Three months after the initial separation, the husband wrote (presumably on legal advice) a letter containing protestations of affection and of his intentions to replace some of the furniture for which the wife had paid, and inviting her to return to him. The wife did not reply to this letter, and the husband made no further approach to her, nor did he at any time attempt to secure accommodation for them or save a penny to repay the money he had spent or to buy new furniture. The Divisional Court held that the husband was in desertion, had never made a bona fide offer of reconciliation which the wife was bound to accept, and that the fact that the wife had told him she did not wish to see him again had not stopped his desertion from running. In reaching this decision Collingwood J. sought to distinguish this case, where the wife had merely *said* she did not want her husband back, from the earlier cases of *Barnett v. Barnett* and *Fishburn v. Fishburn*, where she had sought to lock him out.

A few comments may be appropriate at this stage on *Beigan* and *Bevan*, before considering the earlier cases.

(1) In *Beigan*, it was unnecessary for the husband's departure to amount to full legal desertion. It is clear law that a condoned matrimonial offence may be revived by conduct falling short of a

⁵ [1955] 1 W.L.R. 1142; 3 All E.R. 332.

further matrimonial offence, provided it constitutes harshness or neglect of a real and substantial kind.⁶ Birkett L.J. stressed in his judgment that it is the party who commits the first matrimonial offence who first unsettles the marriage, and that although the other spouse may be prepared to forgive, the old wounds may easily be reopened by later bad conduct by the offending party.

(2) In both *Beigan* and *Bevan*, the husband's departure was the culmination of a course of conduct verging on the intolerable. In *Beigan*, his attempts to persuade his wife to accept into their home the child of his adulterous union; his groundless suspicions that she was guilty of his own offence, his attempts to cut her off from reasonable social intercourse by imposing a curfew on her, and the indignity of causing her son to check her whereabouts with her friends, combined to create a situation in which the wife might well have been justified in leaving him. So also in *Bevan*, where the husband's fraudulent acceptance of his wife's weekly payments over a period of several months, knowing that what she was paying for would be taken from them, must have permanently undermined his wife's confidence in him.

(3) In both cases, the deserted party had made considerable efforts to preserve or stabilise the marriage, and repudiated the deserting husband only under additional provocation. In *Beigan*, having condoned her husband's adultery and endured the course of conduct referred to in (2) above, the wife locked her husband out after he had threatened to strip the house of furniture. In *Bevan*, the wife had made considerable contributions towards the common household (£64 is quite a lot of money to someone earning £4 10s. a week) and told the husband she did not want to see him again only when he demanded a similar sacrifice a second time.

It is, indeed, encouraging to find the court again leaning in favour of the partner who has tried to ensure the continuance of the marriage; too many past decisions in this branch of the law prompt the conclusion that the courts favour the party who stands on his or her legal rights, regardless of the effect on the marriage.⁷ The recent welcome tendency by the courts to administer justice as well as law has nowhere been more manifest than in their dealings with husbands and wives. Clearly this is a field in which rigid principle should be tempered in the light of the general behaviour of the spouses.

The earlier decisions of Sachs J. in *Barnett* and Willmer J. in *Fishburn* share a somewhat muddy setting. In each case the parties had been living a "cat and dog" life for some years, which neither had attempted to resolve; in each case the malice of each

⁶ *Per* Denning L.J. in *Richardson v. Richardson* [1950] P. 16, 23.

⁷ *e.g.*, the strict rules on condonation, now condemned by a majority of the Royal Commission on Marriage and Divorce; the harshness of the trust of property in favour of the purchasing spouse exemplified in *Hoddinott v. Hoddinott* [1949] 2 K.B. 406, and condemned unanimously by the Royal Commission.

spouse towards the other was evidenced alike in the home and the witness-box. There was no wronged and innocent party. In each case the judge's task was not that of deciding which party was telling the truth, but rather of gauging from two fictional and intentionally misleading stories where the more important facts might in truth have lain.⁸

In *Barnett*, there was dispute as to the paternity of a child to which the wife gave birth in 1946. Four years later, the husband left the house with some belongings after a scene in the late evening. Thirteen days later, when he returned to fetch some more of his belongings, the wife had changed the locks on the doors and he secured an entry to fetch his clothes only after invoking the assistance of the police. Three days later, the wife's solicitors wrote asking him to enter into a separation agreement and not to return to the house. The husband agreed, but never in fact signed the agreement, although he paid some maintenance. More than a year later the wife wrote an admirably phrased letter (which the court found wholly out of character and was not prepared to consider bona fide), asking him to return. Three years after the husband's departure both parties petitioned for divorce on the grounds of the other's desertion, but during the course of the hearing, counsel for the husband *conceded* that his client's act in leaving the house amounted to desertion. Sachs J. found that the husband had not proved expulsive conduct by the wife at that time, that he had never subsequently approached her with a view to returning to her, but that the wife, for her part, was and remained glad that he had left. She had evidenced her unshakable intention never to have him back, not only by changing the locks on the doors, but also by her request for a separation agreement and by her attitude as observed by the police when the husband called for his clothes, and subsequently by the court at the hearing. On these findings he held that, by thus decisively negating the husband's return, the wife had stopped his initial desertion from continuing, since "the separation became consensual shortly after it occurred." This prompts the doubt whether it was not in fact consensual (despite the husband's admission through his counsel)

⁸ In *Barnett v. Barnett*, Sachs J. said *inter alia* at [1955] P. 21, 23: "As witnesses, husband and wife are not ill-matched. Each in turn showed a fine disregard for accuracy on matters which were obviously within their knowledge . . . In so far as either made allegations of affirmative facts in furtherance of their respective cases, or in attempted destruction of that of the opposite party, neither reached the lowest standard of reliability needed to secure a judgment of a court on any matter." In *Fishburn v. Fishburn*, Willmer J. said at [1955] P. 29, 33-34: "I confess that I found the evidence of both parties very unsatisfactory . . . This discrepancy between pleaded and proved cases on both sides makes it difficult for me to accept the word of either party where it was in conflict with that of the other, except where it is corroborated by some of the independent contemporary evidence to which I have already referred, or by the essential probabilities of the case."

from the beginning. Thus the wife's petition was dismissed, and the parties were left without a remedy.

In *Fishburn*, the wife had originally withdrawn from the marriage bed because of her suspicions about the husband's relations with other women. These suspicions, which the husband made no attempt to allay, were reasonable at the time, but since the wife never attempted to find out the true facts, and made no allegation of adultery at the hearing, it was held that they had ceased to be reasonable by that time. Some sixteen months later, the husband was convicted of an assault upon her and bound over. Some six months after that he reduced his weekly allowance to her, and after a further six months ceased to maintain her altogether. At about the same time that the maintenance ceased, the wife ceased to cook or perform other wifely duties, and issued a summons for wilful neglect to maintain her. After some negotiations the husband made an offer of maintenance which was admittedly conditional on the wife's leaving him, although no such maintenance was ever paid, and at the time of the hearing the husband had not been maintaining the wife at all for six years. Nevertheless, on a resumed hearing before the magistrates, the wife's complaint was dismissed, and Willmer J. concluded that her case could not have been adequately presented, because no reference was made to the fact that a few weeks before the husband had thrown the wife's clothes out of his room, which had formerly been the matrimonial bedroom, and had locked the door against her. Shortly after the dismissal of her summons the wife fitted a Yale lock to the door of her room to keep out the husband, who had been insisting on bringing his meals in there.

Willmer J. found that the husband was initially guilty of desertion when he threw the wife's clothes out of his room and locked the door against her, but that the wife's reaction in locking her door against him followed so swiftly as not to afford him any reasonable *locus poenitentiae*, and so effectively prevented any possibility of reconciliation as to end the husband's desertion. Thus again the parties were without a remedy.

An important difference between the two cases is that whereas in *Barnett* the husband admitted desertion in the first place, in *Fishburn* desertion by the husband was found by the court. Nevertheless, the facts in both cases were, to say the least, somewhat confused. In *Barnett*, there was the dispute over the paternity of the child, although presumably adultery by the wife could not be proved. In *Fishburn*, it was the wife who first withdrew from the consortium on the basis of suspicions which she never attempted to put to proof, and the court may also have been influenced by the fact that her complaint of wilful neglect to maintain had been dismissed by the magistrates, although clearly no maintenance had been paid. It may well be that the *ratio decidendi* of the two cases should be put no higher than that the court was not prepared to

offer relief to either party on the basis of the evidence before it, or, to repeat the words of Sachs J. in *Barnett*, "neither (party) reached the lowest standard of reliability needed to secure a judgment of a court on any matter."

O. M. STONE.

THE JURISDICTION IN GUARDIANSHIP OF THE
CHANCERY DIVISION

THERE can be little doubt that in *Re G. (an infant)*¹ the Court of Appeal² wanted to achieve the result, in the words of Lord Evershed M.R.,³ "that this unfortunate child should be given the best chance she can have of a happy and useful life." But doubts remain as to the means by which this result was to be achieved. The subject of the case was a girl of four and a half, the illegitimate offspring of a coloured man and an Englishwoman. She had been in the care of her putative father, and was being looked after in Wales "with great kindness" by a woman who also looked after his legitimate child. In 1954 the mother applied for the child to be handed over to her, but Glyn-Jones J. refused to make such an order, finding that there was a mutual attachment between the child and her putative father. The father then applied to have the child made a ward of court, and himself appointed as her guardian; the mother again applied for care and control. Wynn-Parry J., after hearing considerable evidence, decided that he could not possibly consider the mother unsatisfactory and said: "I have decided to exercise my discretion by accepting the mother's undertaking not at any time hereafter to have any contact with the putative father. I regard that as vital. On that undertaking, I direct that the infant be handed over to the mother." He also directed that the child should thereupon cease to be a ward of court. From this latter part of the order the father appealed, asking that the child should remain a ward of court and directions be given for him to have reasonable access. The Court of Appeal unanimously upheld the original order.

There were really three questions at issue here—

- (1) Should the child be transferred to her mother's care and control, or remain in that of the putative father, either where she was or with someone else whom the father might find to take care of her?
- (2) Should she remain a ward of court?
- (3) If she did so remain, should the putative father be granted access?

¹ [1956] 1 W.L.R. 911; [1956] 2 All E.R. 876.

² Of Lord Evershed M.R., Morris and Romer L.JJ.

³ [1956] 1 W.L.R. 911, 918.

In these undoubtedly very difficult circumstances, the decision that the child should be handed back to her mother and that the putative father should not be allowed access to her were probably both wise, if hard. The mother and putative father had quarrelled violently; the mother was in a nervous state, and clearly every convenient means should be taken to reduce the tensions in the child's life. What is perhaps unfortunate is that, in deciding that the putative father had no rights in respect of the child, the Master of the Rolls should say: "in the case of an illegitimate child the limit of the obligation of the father will be to make financial provision for it in order to relieve other people, and particularly the general public, of such obligation. But the father has no such obligation to bring up the child as has a lawful father. The only parent in that respect which the law regards as responsible for the child is its mother." This was in fact the finding in *Re M. (an infant)*,⁴ where it was held that the putative father could not object to the child's adoption, when he had no real alternative to offer, but the principle is surely qualified by the decision in *Re Aster (an infant)*⁵ that where the putative father is prepared to shoulder his moral responsibility, and either to make himself responsible for the child's upbringing, or to find others who will do so on his behalf, and these arrangements are preferable to those the mother can make, the law will accept that offer and appoint a guardian suggested by the putative father, *where that is for the infant's welfare*. The real point would seem to be that in *Re Aster* it was for the child's welfare to become the ward of the putative father's married brother and his wife rather than be adopted by strangers in blood, as the mother intended, whereas in *Re G.* it was for the child's welfare that the relationship with the father should be severed.

But this need not involve the court's washing its hands of the whole affair and handing the child over entirely to the mother. What is objectionable is the decision that the child should cease to be a ward of court. This was a handicapped child, however physically fit she might be; the problems of her upbringing would almost inevitably be greater than those of most English children. Lord Evershed gave this version of the first argument of counsel for the putative father: "In the interests of the child, it is desirable that there should be at any rate some sort of supervision: the mother is the sole reed on which the child's life rests, and, therefore, continuance of the wardship would give the supervision." It is submitted that, when divorced from the putative father's application for access, this is unanswerable. It is particularly unfortunate that the Court of Appeal should have decided against the continuance of the guardianship of the Chancery Division because of the lack of means of the parties, though

⁴ [1955] 2 Q.B. 479.

⁵ [1955] 1 W.L.R. 465; [1956] 2 All E.R. 202.

fortunately the Master of the Rolls expressly refuted any suggestion that the decision was based on the fact that both parties were legally aided. If the jurisdiction in guardianship of the Chancery Division is to be of value, it would seem imperative that its exercise should depend upon need and not on means.

O. M. STONE.

MATRIMONIAL DOMICILE AND MATRIMONIAL PROPERTY

FORTUNATELY or unfortunately (according to taste) it is not often that the judgment in an English case consists almost entirely of a discussion of two academic writers' rival views, but due to an argument "which might almost be said to set the professors by the ears."¹ *Re Egerton's Will Trusts*² has become such a case. The material facts as admitted or established were simple: the testator who was then domiciled in England, married a domiciled Frenchwoman at the Paddington Register Office in 1932. There was no marriage contract or settlement, but it was agreed before their marriage that the parties would settle in France "as soon as possible" and that they would establish their "permanent and only home there." The testator in fact settled in France some time after September, 1934, and either then or at some later date acquired a French domicile of choice. The wife being still alive the issue now before the court was whether the testator's estate should be administered on the footing that the régime of community of property as provided by French law applied thereto. Since no argument was based upon the change of domicile which did in fact take place,³ the issue was narrowed to determining the system of law which governs the rights of husband and wife to each other's movable property where there has been no marriage contract or settlement. It was agreed that this system is the "law of the matrimonial domicile," but hitherto there has been no authority as to the meaning of that phrase and the argument in the present case mirrored a controversy between two of the leading English writers on private international law.

Dr. Cheshire argues that although normally the domicile of the husband at the date of the marriage will be the matrimonial domicile, its selection is the result of no more than a presumption which may be rebutted if at the time of their marriage the parties intended to acquire, and thereafter acquired, a domicile in some other country.⁴ Dr. Morris concedes that this view is at first sight

¹ [1956] 3 W.L.R. at p. 456.

² [1956] 3 W.L.R. 453; [1956] 2 All E.R. 817.

³ The absence of argument on this point was due to "reasons connected with French law" ([1956] 3 W.L.R. at p. 457). Roxburgh J. was accordingly spared from unravelling the exotic mysteries of *Lashley v. Hog* (1804) 4 Paton 581.

⁴ *Private International Law* (4th ed.), p. 494.

reasonable, but rejects it on the ground of impracticability for all save exceptional cases, and prefers the husband's domicile at the date of the marriage.⁵ Roxburgh J. was unable to find any "foundation in the authorities for Professor [*sic*] Cheshire's view,"⁶ and awarded the dispute⁷ "in substance" to Dr. Morris who thereby scored a noticeable victory for Dicey.⁸

The learned judge was impressed (as is Dr. Morris⁹) with the case where an immediate change of domicile is both intended and effected, and suggested (by way of compromise?) that in such circumstances the court would infer from the parties' conduct a tacit agreement that the law of the new domicile was to regulate their proprietary rights.¹⁰ This suggestion had no bearing on the present case where the change was to be effected merely "as soon as possible," but is respectfully submitted to be an admirable method of preventing what, in some circumstances, might be an absurd result. Unfortunately no such compromise is possible of the more notorious controversy concerning the system of law which determines capacity to marry. The arguments against the theory which was rejected in the present case are in substance the same as those which oppose the doctrine of the intended matrimonial home, and are too well known to bear repetition or comment. However the writer cannot forswear drawing attention to the "meagre" evidence of the spouses' intentions which was available for Roxburgh J.'s consideration even although the wife was alive and able to give evidence upon affidavit.

MICHAEL MANN.

POLYGAMY PROBLEMS

UNDER THE NATIONAL INSURANCE ACTS, 1946-1956

A CONFLICT lawyer might well be excused for overlooking the provisions of the Welfare State as being likely to afford him material for thought. However, decisions of the Insurance Tribunal

⁵ Dicey, *Conflict of Laws* (6th ed.), pp. 795, 541-542. Graveson, *Conflict of Laws* (3rd ed.), p. 262 takes a similar view; also Wolff, *Private International Law* (2nd ed.), p. 360.

⁶ [1956] 3 W.L.R. at p. 462. A dictum by Vaughan Williams L.J. (*Re Martin* [1900] P. 211, 240) was the only judicial pronouncement referred to both in the judgment and (*semble*) in argument. There are no English authorities in point, but see *Frankel v. Commissioners of Inland Revenue* [1950] 1 S.A.L.R. 220 cited in Cheshire, *op. cit.*, p. 492.

⁷ The wife's claim to have the estate administered under the régime of community of property therefore failed.

⁸ But see *Re Russian Commercial and Industrial Bank* [1955] Ch. 148, 155 for Dicey in retreat.

⁹ Dicey, *op. cit.*, p. 542.

¹⁰ [1956] 3 W.L.R. at pp. 460-461. Cf. Westlake, *Private International Law* (7th ed.), p. 72.

and Insurance Commissioners show that polygamy problems were¹ capable of arising under sections 14 and 17 of the National Insurance Act, 1946. Section 14 entitles a woman to "maternity benefit," subject to certain conditions, "if she or her husband satisfies the relevant contribution conditions," and section 17 entitles a widow in certain circumstances to "widow's benefit" if "the husband satisfied the relevant contribution conditions."

In dealing with claims for one or the other of these benefits, the insurance tribunals consistently followed the *Hyde v. Hyde*² and *Baindail v. Baindail*³ rules. In all cases of polygamous marriages⁴ the claimants were held not entitled to benefit in right of the "husband's" insurance because the two sections were held, upon a true construction of them, to be, if one may use such an expression, "geared to" monogamous marriages only.⁵ There is, however, a recent decision of the Insurance Tribunal which illustrates a departure from these rules and which will therefore interest conflict lawyers. The decision, which in many respects presents similar features to the *Sinha Peerage Claim*,⁶ is Decision No. R(G) 2/56. The claimant claimed on July 8, 1955, payment of maternity benefit in right of the insurance of S, to whom she was married sometime between 1942 and 1943 in East Punjab, India, where they were both domiciled. Both parties were Sikhs and the marriage took place under Sikh law. Neither party had been married before, and, according to the Sikh religious laws, a husband might take a second wife during the subsistence of his first marriage if he had had no child by his first wife.⁷ S, in fact, had never married a second wife.⁸

On May 18, 1955—that is to say before the claimant submitted her claim—an Indian Statute, the Hindu Marriage Act, 1955, came

¹ "Were" is used advisedly, because, by virtue of section 3 of the Family Allowances and National Insurance Act, 1956, valid polygamous marriages are now to be effective for the purposes of the Family Allowances, National Insurance and Industrial Injuries schemes, if they are in fact monogamous.

² L.R. 1 P.D. 130, at p. 133 (*per* Lord Penzance), that a marriage is not a marriage according to the meaning of that word in English law unless it is, at the time it was solemnised, a "voluntary union of one man and one woman to the exclusion of all others."

³ [1946] P. 122, that a polygamous marriage, valid by both the *leges domicilii* of the parties and the *lex loci celebrationis*, will prevent either spouse from contracting a second valid monogamous marriage in this country if the first marriage is still subsisting.

⁴ Decisions No. CG 116/51, R(G) 18/52 (both widow's benefit) and R(G) 11/53, R(G) 3/55, R(G) 7/55 (maternity benefit) follow the *Hyde v. Hyde* rule; Decision No. R(G) 6/51 follows the *Baindail v. Baindail* rule.

⁵ As, of course, is the Matrimonial Causes Act, 1950; see *Risk v. Risk* [1951] P. 50.

⁶ [1946] 1 All E.R. 348n. Cf. *Mehra v. Mehra* [1945] 2 All E.R. 600.

⁷ Contrast the religious sect which the first Baron Sinha and his wife joined, the Sadharan Brahma Samaj sect. So long as they did not leave the sect, they were bound to practise monogamy.

⁸ Nor, of course, did Baron Sinha, though he could have done had he left the sect.

into force.⁹ The effect of its provisions on the claimant and S was that neither of them could thereafter validly marry another person during the subsistence of their marriage.¹⁰ In other words, as from May 18, 1955, their *actually* monogamous marriage was converted from being a potentially polygamous one into a *legally* monogamous one. As the Tribunal said—

“From that date the possibility of more than one wife or widow being entitled to the same benefit by virtue of marriage to the same man could not arise and as the result of the law of their domicile the marriage of the spouses would be a ‘union for life to the exclusion of all others.’ We are of the opinion that to hold that *after May 18, 1955*,¹¹ S was not the claimant’s husband within the meaning of section 14 (1) of the National Insurance Act, 1946 would do violence to the intention of the legislature evidenced by the language of the National Insurance Acts and their manifest scope and objects.”

The Tribunal regarded as being beside the point that the 1955 Act did not invalidate actually polygamous marriages entered into before May 18, 1955,¹² because the present marriage had never been polygamous in fact. They further pointed out that section 5 (1) of the 1955 Act made it a condition of a future valid marriage that neither party had a spouse living at the time of the marriage so that it was now impossible to say that the parties’ potentially polygamous, though actually monogamous, marriage could become polygamous in fact. It was therefore held that since S was the husband of the claimant as from May 18, 1955, she was entitled to maternity grant in right of his insurance.

It is strange that the Tribunal did not consider the *Sinha* case in connection with the present one, for both cases have in common the feature that the marriages were, at the outset, potentially polygamous. Upon this point the Tribunal had said—

“It is clear that to satisfy Lord Penzance’s definition the union must have been monogamous at the time it was solemnised. This cannot be predicated of the claimant’s marriage so that it cannot be said of her that she *was* ‘married to her

⁹ The order of events is similar in the *Sinha* case: the Baron married, potentially polygamously, in 1880; he joined the sect requiring monogamy in 1886; his son, now claiming his seat in the House of Lords, was born in 1887; he was raised to the peerage in 1919.

¹⁰ Contrast the *Sinha* case; by leaving the sect, the Baron could have validly married another wife.

¹¹ Italics supplied. One may presumably say that Baron Sinha was monogamously married as from 1886.

¹² But, by section 13 (2) (i) of the 1955 Act, a wife could obtain a divorce in the case of any marriage solemnised before the commencement of the Act on the ground that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioning wife, provided that in either case the other wife was alive at the time of the presentation of the petition.

husband by a marriage in the sense in which that term is used in Great Britain. . . ."

and that the situation had never before been contemplated where an actually monogamous, though potentially polygamous, marriage could be converted by a statute such as the 1955 Act into a legally monogamous one.

In rendering this eminently sensible decision, the Tribunal seems to have caught the spirit of Gurvitch¹³—

"Where an ever widening gulf yawns between traditional jurial categories and the reality of law, the sociology of law becomes a burning actuality . . . The jurist can no longer make a single step without doing the work of a sociologist, without calling in the sociology of law. And, since this last, as a methodical science, is often absent from legal education and never occupies the place to which it is entitled, we see here and there the birth of spontaneous sociology of law in the work both of legal theorists and judges."

Even so, both this case and the fact that an Act¹⁴ of 1956 amends sections 14 and 17 of the 1946 Act so as to allow claims by "polygamous wives," inevitably leads one to ask whether amending legislation is needed in other cases where there may be more than one apparently valid claimant for some statutory right. Thus, it is by no means clear that, if H, domiciled in Sierra Leone, married W, similarly domiciled, according to some tribal law of that country permitting polygamy, and subsequently purchased some English immovable property, W could claim the rights of a wife on an intestacy. Nor it is clear what would be the position if H and W acquired an English domicile after their marriage and H died intestate possessed only of movable property. If one looks at section 46 of the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952, they seem to be "geared to" monogamous¹⁵ marriages only. Indeed, if H had, in the above example, actually taken two wives, it would seem even more unlikely that both could claim.¹⁶

Other problems which might well arise for consideration at a later date include the rights of a "polygamous wife" under the

¹³ *Sociology of Law*, pp. 10–11.

¹⁴ By the Family Allowances and National Insurance Act, 1956, *supra*, note 1. See Dicey, *Conflict of Laws*, 6th ed., pp. 226–227. As amended by the 1952 Act, s. 46 of the 1925 Act refers to "a husband or wife," "the husband or wife," "the surviving husband or wife"; indeed subs. (2) reads "A husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons" (*italics supplied*). Lord Maugham in the *Sinha* case, at p. 349, confines himself to the type of situation there under consideration, so that possibly a wife in circumstances similar to those of the claimant in Decision No. R(G) 2/56 could claim on her husband's intestacy governed by English law.

¹⁵ This would seem to follow from the *Sinha* case, at p. 349, and *Seedat's Executor v. The Master* [1917] A.D. 302.

¹⁶ The children would be safeguarded, since, even if they are regarded as illegitimate, the Acts cover them.

Fatal Accidents Acts; the Inheritance (Family Provision) Act, 1938, as amended by the 1952 Act; her right to a grant of administration under the Non-Contentious Probate Rules, r. 21 (1); her position under sections 12 and 17 of the Married Women's Property Act, 1882. It would certainly seem that the only sure method of settling the problem of these potential legal Cinderellas in such respects is to consider extending the provisions of the 1956 Act to cover them.

P. R. H. WEBB.

OCCUPIER'S LIABILITY FOR NEGLIGENCE

THE heroine lies bound hand and foot on the railway track. The express is thundering towards her. The problem for this juristic scenario is to determine who is the hero and who the villain. I stigmatise as the villain the man who asks whether the heroine is an invitee, a licensee or a trespasser. My hero is the man who says that the categories of invitee, licensee and trespasser have nothing to do with the case, and that the sole question is whether the engine driver is negligent. But there are still lawyers who would put my hero in gaol as a subverter of the established laws.

Since *Dunster v. Abbott*¹ the doctrine of liability of an occupier of land for active negligence, despite its rejection by one textbook writer, has made progress. It made its forensic appearance in that case when Denning L.J. said in his judgment: "it does not matter whether the plaintiff was an invitee or a licensee. That distinction is only material in regard to the static condition of the premises . . . It has no relevance in regard to current operations, that is, to things done on the premises." In a note in this *Review*^{1a} this thesis was linked with the juristic doctrine of the American *Restatement* and the views of Marsh and Newark. The principle was applied by Finnemore J. in *Slade v. Battersea and Putney Group Hospital Management Committee*,² and supported in further notes in this *Review*.^{2a} It has now been restated by Denning L.J. in the leading judgment in *Slater v. Clay Cross Co., Ltd.*³ and is supported by his brother judges. Birkett L.J. said: "I am entirely of the same opinion and have nothing to add." Parker L.J. said: "it seems to me that the question of the relationship between the parties, licensor and licensee, is wholly immaterial except in this respect, to show that the plaintiff herself was lawfully on the land." The doctrine is surely now well established, and may yet be accepted by the textbooks.

¹ [1953] 2 All E.R. 1572; [1954] 1 W.L.R. 58.

^{1a} 17 M.L.R. 265.

² [1955] 1 All E.R. 429; [1955] 1 W.L.R. 207.

^{2a} 17 M.L.R. 368; 18 M.L.R. 375; 19 M.L.R. 79.

³ [1956] 2 All E.R. 625.

The facts in the case were these. A railway line owned by the defendants ran through a tunnel for sixty-six yards. The villagers of Crich used the railway track, including the tunnel portion, as a short cut to and from Ambergate. The defendants acquiesced in this practice, and the trial judge found that the plaintiff, who was injured by a train while in the tunnel, was a licensee. He also found that the engine driver was guilty of negligence in failing to whistle before entering the tunnel and in driving too fast in the circumstances.

The defendants urged that while they might have been guilty of a breach of the special duty owed to invitees, they were not guilty of a breach of the lesser duty owed to licensees. The plaintiffs, however, were successful.

The *ratio decidendi* of the judgments is that the case was one of "current operations . . . being carried out on the land" and "the defendants, in carrying on their operations, were under a duty to take reasonable care not to injure anybody lawfully walking on the railway."⁴ The defendants failed in that duty. Whether there was a failure of duty or no is in our legal terminology "a question of fact," on which the Court of Appeal accepted the trial judge's findings.

Denning L.J. also expressed the opinion that the plaintiff would have succeeded even if the court had to consider the rules relating to invitees and licensees. He considered that the duty owed to a licensee is as high as that owed to an invitee; there is no longer any difference between the duty owed to an invitee and the duty owed to a licensee. This exciting dictum is *obiter*, since, as has already been said, Denning L.J. considered that the distinction had no relevance to the instant case. It is interesting, however, to note that he bases his opinion on the effect of the decision of the Court of Appeal in *Hawkins v. Coulsdon and Purley U. D. C.*⁵ "The classic distinction was that the invitor was liable for unusual dangers of which he knew or ought to know, whereas the licensor was liable only for concealed dangers of which he actually knew. This distinction has now been reduced to a vanishing point. The decision of this court in *Hawkins v. Coulsdon and Purley U. D. C.* shows that a licensor too, as well as an invitor, is liable for unusual dangers of which he knew or ought to have known. The broken step in that case was not a concealed danger, but it was an unusual danger. The local authority did not know that it was a danger, but they ought to have known it."⁶ This, however, oversimplifies! It ignores the distinction between knowledge of the facts which constitute a danger and knowledge that the facts constitute a danger. The local authority in *Hawkins'* case knew of the physical facts constituting

⁴ *Per* Denning L.J. at p. 627E.

⁵ [1954] 1 Q.B. 319.

⁶ p. 627B.

the danger, namely the badly broken step. Had they not known of those physical facts they might not have been liable. But despite absence of such knowledge they would have been liable to invitees. *Hawkins'* case, unfortunately, does not abolish the distinction between invitees and licensees, though it provides ample illustration of the unsatisfactory state of laws which take note of such distinctions, "the morass into which the law has floundered."^{6a}

Another troublesome branch of the law of tort, also dealt with by Denning L.J., is that embraced by the Latin phrase *volenti non fit injuria*. New problems have appeared to add to the perplexities discussed in Bohlen's classic essay on "Voluntary Assumption of Risk."⁷ Denning L.J. provides some very sensible solutions for them. The trial judge had apportioned blame as to 60 per cent. to the engine driver and as to 40 per cent. to the plaintiff. The court saw no reason for altering these proportions. The case was one where the carelessness of both plaintiff and defendant caused the injury—in this sense of the term it was one of "contributory negligence." Consequently the defence of *volenti non fit injuria* did not apply. "Where knowledge of the danger is not such as to render the accident solely the fault of the injured party, then it is not a bar to the action."⁸ The plaintiff exposed herself to some risk by using the tunnel, but she did not assume the risks arising from the negligence of the driver. The Lord Justice considered that a similar explanation was to be found for *Dann v. Hamilton*,⁹ a decision of which he approved. It was a case on the limits of *volenti non fit injuria* in which the issue of contributory negligence was not raised. Denning L.J. very properly referred to Lord Asquith's note on the case¹⁰ in order to exhibit the *ratio decidendi* of the judgment of Asquith J.

Launched on the sea of *volenti* Denning L.J. proceeded to chart not only the currents directly affecting the case before him, but also to trace a more general movement. He defended his judgment in *Greene v. Chelsea Borough Council*.¹¹ The distinction between *sciens* and *volens* has long been established but a new gloss is supplied. Knowledge of danger cannot be *volens* unless "the party is free to act on it" and so avoid the danger. In *Greene's* case the plaintiff housewife knew of the crack in the

^{6a} Denning L.J. said: "The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished, but this result has already been virtually attained by the decisions of the courts" (p. 627A). Though I do not agree with Denning L.J. that court action has produced the desired result for static condition of premises, yet I am happy to note that the recommendation of the Law Reform Committee has been embodied in a Bill, and may soon be enacted by Parliament

⁷ 20 Harv.L.R. p. 14 and p. 91.

⁸ p. 281.

⁹ [1939] 1 K.B. 509.

¹⁰ 69 L.Q.R. 317.

¹¹ [1954] 2 All E.R. 318; [1954] 2 Q.B. 127.

ceiling, but she had no alternative accommodation and so could not avoid the risk of the ceiling falling. Here, however, we have again the failure to distinguish knowledge of physical facts and knowledge that the facts constitute a danger. Singleton and Morris L.JJ. in *Greene's* case considered that the plaintiff had no knowledge of the dangerous condition of the ceiling, though she had complained of its cracked condition. She had been lulled by the inspectors into believing it was all right. However the doctrine that submission to a danger when there is no opportunity of avoiding it is not *volens* adds very little, if anything, to the old cases of *Yarmouth v. France* and *Smith v. Baker*. What is novel is using this doctrine in relation to the liability of an occupier to invitees and licensees. In *Greene's* case, and again in the present case, Denning L.J. has said that notwithstanding *London Graving Dock v. Horton*,¹² an occupier does not escape liability to an invitee merely because the invitee had knowledge of the danger. Lord Porter in *Horton's* case said "the invitor must show that the invitee accepted the risk with full knowledge of the dangers involved": and this formula invites the application of the well-known limitations of *volenti non fit injuria*. But Lord Porter was seeking to show that those limitations had no application to the relation of invitor and invitee: and Lord Norman expressly states that as between invitor and invitee *sciens* and not *volens* is sufficient.¹³

Whatever be the *ratio* of *Horton's* case it is difficult to see the relevance to the instant case of the doctrine that knowledge of danger is insufficient for a plea of *volenti* unless there is freedom to act on it and to avoid the danger. The plaintiff was free not to go into the tunnel. In choosing to go in she took on herself such risks as arose from the non-negligent driving of trains through the tunnel. She had no knowledge then of actual danger arising from negligent driving. When in the tunnel, with the train swiftly approaching her without due care, she may then have become

¹² [1951] A.C. 737.

¹³ Whether the plaintiff in *Horton's* case was *volens* is not of great significance. "The question whether in any particular case a plaintiff was *volens* or *volens* is a question of fact and not of law": *per* Bowen L. J., *Thomas v. Quartermaine* (1887) 18 Q.B.D. at p. 696. Thus whether a party is free to avoid a danger is a question of fact. Whether the plaintiff workman in *Horton's* case was free to avoid the danger of the defective staging would, if material, have been a question of fact. Street, too, concisely stating the view of Denning L.J., propounds the absurdity that in *Horton's* case "the workman was there free to avoid the danger by choosing to sue his employers instead of the occupiers" (*The Law of Torts*, p. 201). The thesis of Denning L.J. in *Greene's* case is that *Horton's* case was decided on the assumption that the workman was *vis-à-vis* the occupiers free not to use the staging. The *Smith v. Baker* doctrine of lack of freedom arising from economic necessity was assumed in *Horton's* case to apply only in a suit between worker and employer. The assumption is unrealistic. Denning L.J.'s basic point is that *Horton's* case lays down no restriction on the test of freedom to avoid a danger wherever such a test is material. The courts should take the actual conditions into account, including in all cases the necessity of earning a living.

aware of the danger of the negligent driving, but she was not then free to avoid the peril in which she had been placed by the negligence.

The significance of *Slater's* case lies in the affirmation by a unanimous Court of Appeal of the doctrine laid down by Denning L.J. in *Dunster v. Abbott*. That doctrine is said by Street¹⁴ to be "not, however, quite accurate in view of the decided cases." He quotes *Cox v. Coulson*¹⁵ and *Hall v. Brooklands Auto Racing*.¹⁶ He admits, as regards *Lowery v. Walker*,¹⁷ that "one cannot be sure whether or not it was decided on ordinary negligence." In both the former cases the doctrine of "current operations" was not raised: in neither case was the defendant responsible for the operations. The defendants could only have been liable because of the defective condition of the premises. It is unfortunate, moreover, that Street's discussion is limited solely to judicial dicta and that no reference is made to the relevant juristic literature. This is a general feature of the book; and shows how widely academic opinions differ as to the tasks of university students. If textbook writers limit themselves to decided cases would not the mental development of the student be better served by case books?

In my notes on the doctrine of *Dunster v. Abbott* I have urged that the principle ought also to apply to trespassers. I have to report, however, that once again the court has carefully excluded trespassers from the ambit of the doctrine. My favourite example when discussing the problem with students has been that of the owner of a country estate motoring along his private drive. Clearly, I have urged, when he sees a man in the drive he owes the same duty to be careful arising from physical proximity to him, whatever the status of the man. A law which sought to establish a lower duty to some men would ignore the dictates of common humanity. My imaginary example has also been used by Denning L.J. It appears in this form: "If a landowner is driving his car down his private drive and meets someone lawfully walking on it, then he is under a duty to take reasonable care so as not to injure the walker; and his duty is the same no matter whether it is his gardener coming up with plants, a tradesman delivering goods, a friend coming to tea, or a flag-seller seeking a charitable gift."¹⁸ I hope that the limitations of duty to "someone lawfully walking" arises from a desire not to make a statement wider than the facts of the case warrant. We do not want a revival of the buried doctrine of "plaintiff a wrongdoer."

J. L. MONTROSE.

¹⁴ *Law of Torts*, p. 195.

¹⁵ [1916] 2 K.B. 177.

¹⁶ [1933] 1 K.B. 205.

¹⁷ [1911] A.C. 10.

¹⁸ [1956] 2 All E.R. at p. 627D.

FRUSTRATION—DECLINE OF THE IMPLIED TERM THEORY

THE House of Lords, in *Davis Contractors, Ltd. v. Fareham U. D. C.*¹ reconsidered the theoretical basis of the doctrine of frustration.

In 1946, building contractors agreed with a local authority to build seventy-eight houses in eight months for a certain price. The contract contained escalator clauses with regard to prices of certain materials and rates of wages, and a liquidated damages clause to deal with delay in completion of the work, subject to the surveyor being required in certain events to allow such additional time as he might deem fair and reasonable. Both parties, on the evidence, contemplated the possibility of some delay due to labour shortage, but no provision was made by contract to deal with this contingency or expressly to impose on the local authority any additional cost arising from a delay so caused.

As it turned out, owing to an unexpected lag in the demobilisation of building labour after the war, adequate supplies especially of skilled men were not immediately available to the contractors, so that the total duration of the job was in fact twenty-two and not eight months. Consequently, the contractors incurred an additional cost of around £20,000, which they sought by legal action to recover from their client. The main basis of their claim was that the unexpectedly long delay, due to neither party's fault, frustrated the contract in law, and that the ultimate completion of the work took place under the terms of an implied contract containing an implied promise by the local authority to make the building contractors reasonable recompense for the additional expenditure involved.

The builders' claim was unsuccessful. The House of Lords held that the contract had not been frustrated in law, and in coming to this conclusion the juridical basis of the doctrine of frustration was submitted to a most important re-examination. Of the three law Lords who considered this theoretical question, two (Lords Reid and Radcliffe) expressly rejected the implied term theory, while Viscount Simonds expressed his indifference whether or not that theory was to be preferred to the theory of positive judicial intervention.

In the light of these judgments, it is plain that the tide is now set in favour of explaining the discharge by the courts of contractual obligations under the doctrine of frustration as the exercise of an essential "qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation,"² and not in the terms of

¹ [1956] 3 W.L.R. 37.

² [1951] 1 K.B. 190, 200 (*per* Denning L.J. in the *Movietonews* case in the C.A.).

the implied term explanation of merely carrying out the implicit will of (both) the parties.

But, this conceded, there remains still the vital technical problem of defining the circumstances in which the courts will exercise their power of exonerating a party from obligations solemnly undertaken. In this respect the sharp rebuttal by Viscount Simon in the *British Movietonews* case³ of Denning L.J.'s views in the Court of Appeal may now be seen not as any desire to obscure the realities of the judicial process but as deriving from an apprehension—quite misconceived in my respectful opinion—lest the realistic version of the doctrine of frustration might undermine the cardinal policy of sanctity of contracts, by suggesting to parties that the plea of frustration had become a “soft option” among available defences. Nothing could be further from the truth—as their Lordships made clear in *Davis's* case.

As an exercise of the “qualifying power,” “the doctrine has been, and must be, kept within very narrow limits.”⁴ “Frustration is not to be lightly invoked as the dissolvent of a contract.”⁵ It is “a rule which the courts will apply in certain limited circumstances.”⁶ Subject, however, to this necessary note of caution, what are the legal criteria that determine the doctrine's positive operation?

Lord Radcliffe rejected the implied term theory and explained the circumstances in which the doctrine of frustration operates to terminate a contract in words that already have a classical ring and though lengthy merit quotation in full:

“Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which *ex hypothesi* they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticised as obscuring the true action of the court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed upon themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed.⁷ But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they

³ [1952] A.C. 166, 181 *et seq.*

⁴ Viscount Simonds, 49.

⁵ Lord Radcliffe, 61.

⁶ *Ibid.*

⁷ See *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*, *per* Viscount Simon, *supra*, 184.

were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be given 'irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances.'⁸ The legal effect of frustration 'does not depend on their intention or their opinions, or even knowledge, as to the event.'⁹ On the contrary, it seems that when the event occurs 'the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.'¹⁰

"By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

"There is, however, no uncertainty as to the materials upon which the court must proceed. 'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred.'¹¹ In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."¹²

In sum, then, whether an appeal to the doctrine of frustration is successful depends on the proper construction of the contract, by which is meant, deciding whether the new situation that

⁸ *Hirji Mulji v. Cheong Yue Steamship Co., Ltd.* [1926] A.C. 497, 510.

⁹ *Ibid.*, 509.

¹⁰ *Dahl v. Nelson* (1881) 6 App.Cas. 38, 59, per Lord Watson.

¹¹ *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co., Ltd.* [1944] A.C. 265, 274-275, per Lord Wright.

¹² *Davis's case, supra*, 61-63.

transpired fell within the scope of the contractual undertaking originally made by the defendant, taking into account the kind of transaction involved. Generally speaking, in business transactions, this abstract test will come down to the concrete issue of whether, in the light of the contractual terms and particular type of transaction in question, the defendant might reasonably be said to have undertaken the business risk of pecuniary loss resulting from the turn that events took. In *Davis's* case, the House of Lords decided that the builders had assumed the business risk of bearing the additional cost due to delay, even serious delay, in completion.¹³

If building contractors wish to mitigate such risks, "their safety lies in the insertion of explicit conditions in any fixed price contracts they may undertake."¹⁴ But conditions of this kind may of course render the contractor's offer insufficiently attractive to the prospective client. It depends on the state of the market; and the decision to take such risk or not is strictly a business decision. If, to obtain business, express contractual coverage is omitted, it would be wrong for the businessman to be able to rely on the courts to shelter him afterwards from the accepted business hazard. On the other hand, the position is different if events impose a loss which could not be said to follow from the normal business hazards of the type of transaction in question, such as where a "fundamentally different situation"¹⁵ arose from that contemplated by the contract. What is a "fundamentally different situation" is a matter of delicate judicial appraisal in each case of alleged frustration.¹⁶ For building contractors, the meaning of the conception probably begins with the situation in *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*¹⁷

C. GRUNFELD.

FUNDAMENTAL BREACH OF CONTRACT

THE facts in *Karsales (Harrow) Ltd. v. Wallis*¹ are classic, and it is a pity that the judgments do not quite reach the potential heights that were attainable. But it is a useful case nevertheless, and likely to be fruitful in stimulating others to seek justice under its branches. If it cannot claim to be a new sapling, it gives great viability to one that had made little headway.

A man named Stinton offered a Buick car, KKC 822, to Wallis, the defendant. Wallis inspected the car and found it excellent.

¹³ See especially at 56, 64 and 67.

¹⁴ At 66.

¹⁵ *British Movietone News, supra*, 185 (per Viscount Simon).

¹⁶ Used in its narrower sense. Nowadays, other things being equal, subsequent physical or legal impossibility operates automatically.

¹⁷ [1918] A.C. 119.

¹ [1956] 1 W.L.R. 936; [1956] 2 All E.R. 866.

He wanted to buy it but could do so only on hire-purchase. Stinton tried to arrange this but he clearly met the difficulty that any private person meets: finance companies want recourse agreements, and will take them only from dealers. So Stinton arranged to sell the car to the plaintiffs, Karsales, who were dealers. He did not give possession to Wallis and after the agreement had been completed some days elapsed before delivery was made by Stinton because Stinton had not been paid. Eventually Stinton effected delivery of what might still perhaps be described as Buick car KKC 822 except that the cylinder head of the engine had been removed, the valves in it were burnt out and two of the pistons broken. It had been towed to Wallis's premises late at night. Also the tyres had been changed, the radio removed and some chromium adornment taken off.

Wallis refused to accept the car and got Stinton to retake it. Wallis also refused to pay any instalments to the finance company, who, it seems, operated their recourse agreement and made Karsales take over the hire-purchase agreement. This action for arrears resulted from continued refusal to pay.

Three points arose in this case: (1) Whether the defendant had been offered the goods described in the hire-purchase agreement, and, even if not, whether an exemption clause in respect of alleged breaches of conditions or warranties express or implied protected the plaintiffs; (2) Whether a claim that the exemption clause did not protect could be sustained without having been pleaded in express terms or whether, the facts showing that to be the case, judgment could be given on that basis; (3) Whether an action for arrears was proper where the goods had been rejected by the hirer, or whether a claim for damages was not the proper claim.

The judgment of Parker L.J. is preferred. His Lordship held that there was a duty on a hire-purchase finance company to ascertain that the chattel is reasonably fit for the purpose for which it is expressly hired. But although exemption clauses are commonly inserted to give protection from that liability, it was held that they do not and cannot operate to give protection from the breach of a *fundamental term*. His Lordship adopted the definition of fundamental term to be found in the judgment of Devlin J. in *Smeaton Hanscombe v. Sassoon I. Setty* (No. 1),² wherein the learned justice says in effect that it is a concept narrower than the concept "condition." Here there was such a breach because the car was incapable of self-propulsion. Denning L.J. adopted a similar line of reasoning except that he says that a breach of a fundamental term is something that goes to the root of a contract. This is unobjectionable if his further statement that it is something "different in kind" is regarded as

² [1953] 1 W.L.R. 1468.

exegetic but not if regarded as an alternative, since the term "goes to the root" is usually used as wide enough to cover conditions.³

On the point as to pleadings, the court allowed the submission that there was a breach of a fundamental term, as revealed by the facts, to be received notwithstanding that the pleadings did not sufficiently make this clear.

They further held that the claim for the instalments could never have succeeded, because the hirer refused delivery: the proper remedy is damages. On that the plaintiffs would have been in a difficulty if they had sought damages for, apart from the fundamental breach, they had only taken an assignment of the right to the payments of hire.

A similar point on what is a fundamental breach arose in the case of the *Caspiana* (*G. H. Renton, Ltd. v. Palmyra Trading Corporation of Panama*)⁴ in respect of which an appeal to the House of Lords is pending. It will be of interest to see whether the Law Lords adopt or amplify the principle involved, and in particular, whether they make clear the distinction between a condition and a fundamental term.

L. W. MELVILLE.

LORD GODDARD'S GAMBIT DECLINED

THE facts of *Inland Revenue Commissioners v. Hambrook*¹ were that a tax officer, an established civil servant, was injured, when off duty and riding his motor-cycle, in a collision with a motor-car driven by the defendant. The civil servant, who was one-third to blame for the accident, was off work for nearly ten months, during which time the Inland Revenue Commissioners paid him sick pay. In an action for damages *per quod servitium amisit* by the Crown for recovery for that sum, it was held by Lord Goddard C.J. that the action failed. The Court of Appeal dismissed the appeal.

The Lord Chief Justice by his judgment gave the appellate courts a great chance to clarify some dark areas in the legal relationship of the Crown to its servants. To mix the metaphor, his opening was none of your pawn-to-King-four-and-let's-see-what-the-other-chap-does efforts. In his masterly but concise judgment, the Court of Appeal was given many acquisitive opportunities. I am not sure Lord Goddard did not castle on the Queen's side just for good measure. But the Court of Appeal refused to play this game.

³ See the writer's discussion of the question generally in this volume of this journal at pp. 26 *et seq.*, *ante*.

⁴ [1956] 1 Q.B. 462; [1956] 2 W.L.R. 232.

¹ [1956] 2 W.L.R. 919; [1956] 3 W.L.R. 643.

Denning L.J. traced the development of the action, covering a little more than 500 years in four pages. He concluded that the action should be confined today to "the realm of domestic relations where a member of the master's household is injured . . . It does not lie, therefore, at the instance of governments, limited companies, or other employers who keep no household . . . A servant has long since ceased to be regarded as a slave. It is time he ceased to be looked upon as a chattel. He should be looked upon as a free human being, and not less so when he is a civil servant." Birkett L.J. and Parker L.J. in other words endorsed this view. So the action *per quod servitium amisit* has little to look forward to. In its declining years, it must comfort itself with its long memories and those moments in the nineteenth century when there were hopes of a future, broadening down from precedent to precedent.

It would be a pity if Lord Goddard's judgment were forgotten. His first important passage was a consideration of the nature of the employment of an established civil servant. He preferred to describe such a servant, whatever his grade, as an "officer in the civil employment of Her Majesty." He went on: "It is settled beyond controversy that the Sovereign can terminate at pleasure the employment of any person in the public service, except in special cases where it is otherwise provided by law." For this he found authority in *Shenton v. Smith*² and *Dunn v. The Queen*³ but added that it was curious that there did not appear to be a definite and clear decision as to whether there was a contract of service between the Crown and its officers in the Civil Service, quoting Lord Atkin in *Reilly v. The King*⁴: "a power to determine a contract at will is not inconsistent with the existence of a contract until so determined." The trend of opinion in that Privy Council case he found to be "that in the absence of some special term, such as engagement for a definitely expressed period, there is not a contractual relationship." Lord Goddard adhered to the opinion he had expressed in *Terrell v. Secretary of State for the Colonies*⁵ that a discharged civil servant could recover his salary for the time he had served but this, he said, would be on a *quantum meruit*. His conclusion was: "an established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment by the Crown, though there may be, as indicated in *Reilly's* case, exceptional cases, as, for instance, an engagement for a definite period, where there is a contractual element in or collateral to his employment."

² [1895] A.C. 229.

³ [1896] 1 Q.B. 116.

⁴ [1934] A.C. 176 at 180.

⁵ [1953] 2 Q.B. 482.

The following questions arise from these statements by Lord Goddard. (1) What is the nature of the provision "by law" which excludes the Sovereign's right to terminate at pleasure the employment of those in the public service? (2) Is a term of "engagement for a definitely expressed period" (which sets up a contractual relationship) such a provision? (3) Does the "contractual element in or collateral to" employment (where there is engagement for a definite period) make it possible for the person in public service to sue for damages for breach of contract?

Hitherto the argument has gone thus. If the basis of the Crown's right to dismiss at pleasure is the prerogative, then a non-statutory undertaking by the Crown to engage for a definite period is unenforceable and perhaps nugatory; a statutory provision might be regarded as cutting down the prerogative and so give a right of action. If the basis is an implied term, then the implication is gone once there is an express statutory or non-statutory provision to the contrary and an action will lie. If the basis is some general principle of public policy, then, depending on the circumstances, this principle might override a non-statutory undertaking and would be important in interpreting a statutory provision which appeared to conflict with it. It becomes important to know what in question (1) above is meant by "by law" and whether "engagement" in questions (2) and (3) above is limited to statutory provisions.

Where a person is appointed to the public service for a definitely expressed period, he is usually dismissible on certain stated grounds. It seems common justice that he should be entitled to damages if he is dismissed on other grounds within that period. This is the first unresolved difficulty. The second is, if there is no expressed period but the grounds of dismissibility are stated, whether this is sufficient to give rise to an enforceable "contractual element." Lord Goddard's learned judgment does not clearly answer these problems though his analysis has greatly helped. The considered opinions of the Court of Appeal might have thrown further light. But they declined Lord Goddard's opening gambit.

J. A. G. GRIFFITH.

REVIEWS

THE PROOF OF GUILT. A Study of the English Criminal Trial.
By GLANVILLE WILLIAMS. (*The Hamlyn Lectures*, Seventh Series.) [London: Stevens & Sons, Ltd. 1955. viii and 294 pp. 17s. 6d. net.]

It might be said, with profound respect, that rather like Lord Justice Denning on the Supreme Court bench, Dr. Glanville Williams is something of an *enfant terrible* among academic lawyers. In a profession which is by training and instinct inclined to abhor innovation, neither of them is in the least reluctant, if need be—and there often is crying need—to tackle controversial issues and to rush in where even angels fear to tread. Both are keenly and sensitively alive to the fact that the common law is a living, growing organism which must remain in close touch with the needs and purposes of the society in which it has its vital function, and if they are sometimes a little (and not quite fairly) impatient with its traditional slow rate of development, even their critics must admit that they are often proved right in the long run.

For last year's Hamlyn Lectures, the seventh in this most valuable series, Dr. Glanville Williams has chosen the subject of *The Proof of Guilt*, a study of the English criminal trial by way of comparison with the principal Continental systems. It is not easy to imagine a topic more fitting to the Hamlyn Trust, designed as it is expressly "to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European peoples and, realising and appreciating such privileges, may recognise the responsibilities and obligations attaching to them."

There is in fact today, as there was at the time of the French Revolution, a considerable consensus of opinion, not only in this country but also among informed foreign observers, that for impartiality and independence of the judges, for speed (a point, I think, barely touched on by Dr. Glanville Williams) and for fairness towards the accused, the British system of trial is indeed a privilege to be most highly valued by comparison with most or even all modern European countries. In the face of the natural pride which English lawyers feel in the administration of their criminal justice, Dr. Glanville Williams has the boldness to subject to serious and searching criticism many time-honoured features and aspects of the law of proof. Since he brings each question to the touch-stone "whether the particular rule concerned is the best conceivable"—a tall order indeed—the result is (within the limits of a short course of lectures) the most challenging survey of the English Law of evidence to have appeared since Best.

Dr. Glanville Williams goes quickly into *medias res*. "If there is serious criticism of the present system," he says on p. 15, "it is not so much because it leads to the conviction of the innocent as because it too readily assists the acquittal of the guilty." This is indeed one of the main themes running through this book and its impact is felt in many, seemingly disparate, fields. The lecturer quotes the dictum of Viscount Simon in *Stirland* [1944] A.C. at p. 324 that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent," and raises, though only in passing, the interesting point that rules giving *excessive* protection to the accused and so tending to lead to unjustified acquittals are bound to look increasingly unsatisfactory when penology is viewed from the remedial rather than the punitive angle.

One of the rules which may well have a bearing on this is the right enjoyed by the accused—even if exercised only at additional risk—not to enter the witness box if he wishes to avoid being questioned at his trial. This is plainly not a proposition that may operate to acquit the guilty for fear of convicting an innocent man; “the crux of the matter is,” as the author points out, “that immunity from being questioned is a rule which, from its nature, can protect the guilty only.” Dr. Glanville Williams suggests “a sensible solution” which would be “to require an accused to listen to questions put to him by counsel for the prosecution, though with no penalty for refusal to answer.” Mr. Rupert Cross, discussing this suggestion, seems to consider this objectionable on the ground, if I understand him correctly, that it would prevent the defence from submitting that there is “no case to answer” at the end of the case for the prosecution. I am not sure that it inevitably would, but I am seriously doubtful whether the advantages to be gained would outweigh the grave objection which can rightly be raised against forcing a man to go into the witness box which may lead him to give evidence against himself, and that on oath.

This leads straight to the strange attitude of the English law of evidence which insists (for reasons not quite easy to fathom) on treating the accused on trial for his liberty or maybe his life, where he does choose to be questioned, as if he were an ordinary witness with merely an academic interest in the outcome of the proceedings. This shows itself not merely in the fact that he stands in the witness box and is required to proffer what is in the circumstances a wholly meaningless witness oath (meaningless in the sense that it is absurd to prosecute him for perjury and that there is in fact very little prospect of such a prosecution however tall the lies he tells¹). Dr. Glanville Williams expresses the hope that “Parliament may one day recognise that the retention of a choice between the sworn and unsworn statement is unnecessary for justice” and that the sworn statement be abolished, and this is certainly an arguable proposition. But while I admit that the value of any witness oath in judicial proceedings is debatable, I would certainly not agree with him that “the only way of withdrawing the oath from the defendant, . . . if manifest unfairness is to be avoided, is by withdrawing it from the prosecution also.” This is surely proving too much, and one cannot help feeling that at this point even Dr. Glanville Williams is falling into the error of assuming a kind of identity between the accused in the witness box, and an ordinary witness, where in fact no conceivable parallel exists.

This confusion also seems to befog the law on a more vital subject, namely the limitations imposed upon the rule excluding evidence of previous convictions. Here, Dr. Glanville Williams makes some of the most forceful points in his book. “On the face of it,” he writes, “the English system might seem over-lenient to the accused” (over character and previous convictions), but he has no doubt of “the continuing need for the rule when there is a jury.” Since the judge does not have to adjudicate upon the facts, there can be no objection to the availability (to him) of the record on the Calendar.

¹ Dr. Glanville Williams stumbles, however, into one of the obvious pitfalls laid for academic lawyers when the absence of reported cases in *The Law Reports* leads him to state baldly (on p. 65) that the possibility of prosecution for perjury is “mere theory” and goes on to assert that, since “an isolated prosecution” in 1899, “the practice during the present century has been not to proceed against persons for committing perjury when on their trial.” This reviewer has heard of such prosecutions from time to time and on the very day of writing this review came across a news item in the *Evening Standard* according to which at Surrey Assizes a man was sentenced by Mr. Justice Stable to eighteen months’ imprisonment for perjury on the ground that he falsely swore before Epping magistrates that he had not been driving a motor-car while disqualified, with the result that the case against him was then dismissed.

The same, however, does not, as Dr. Glanville Williams points out, apply on appeal to Recorders nor to Chairmen of Quarter Sessions Appeals Committees, and he therefore suggests some different arrangement, such as that which the Lord Chief Justice has in the meantime recommended in *R. v. Grimsby Quarter Sessions* [1955] 3 All E.R. 300. This meets with no little practical difficulty, but theoretically, there can be no doubt, Dr. Glanville Williams is right.

Taking so staunch a line in favour of exclusion of prejudicial evidence, it is not surprising that the lecturer should have some harsh (and fully justified) things to say about the rule in the 1898 Act which deprives the accused of his "shield" against cross-examination as to credit where "the nature and conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." If, as is universally acknowledged, evidence of the accused's previous convictions is excluded for fear that undue prejudice created thereby may lead the jury to take a wrong view of the evidence of the facts in issue, then it is plain beyond doubt that, as Dr. Glanville Williams says, "this reason of policy exists whether or not counsel for the defence finds it necessary to question the character of the witnesses for the prosecution." A string of almost irreconcilable cases full of hair-splitting distinctions testifies to the convulsive efforts made by the courts over many years to escape the plain implications of the word "imputation"; even now it is by no means clear what the defence ought to do when it has reason to believe that one of the witnesses for the prosecution may have committed the crime charged. This statutory rule can only serve to make suspect evidence from doubtful sources appear more reliable than it is. The explanation sometimes adduced that the accused must not be allowed to set his "evidence" against other witnesses without being open to the same mode of attack is fundamentally misconceived. It rests, like other misconceptions, on the false assumption that the accused, when he submits to examination, is a witness more or less like any other. There is indeed "hardly any rule of the law of evidence that is more in need of change" than this proviso (f) in s. 1 of the 1898 Act.

This illogical rule is fortunately one of the very few restrictions on cross-examination of witnesses recognised in English law²; "fortunately," I say, in view of the profound faith which English law of evidence reposes throughout in cross-examination as the *chief* and indeed indispensable safeguard of reliability of all testimony. Cross-examination as practised in this country comes out of Dr. Glanville Williams' searching investigation, as one would expect, with flying colours; it has indeed, over many years, proved highly effective in bringing out, in court, lies of commission as well as of omission. It may, however, as the author concedes in his chapter on "Mistaken Evidence," fairly be doubted whether cross-examination is of equal value in dealing not with unwilling or dishonest witnesses, but with the far more serious problem of inaccurate observation and recall, with genuine mistake (however confident). The lecturer quotes a few experiments made on spasmodic occasions in this country (notably at the L.S.E.), but it is much to be regretted that the vast amount of work done in this field by lawyers and psychologists on the Continent (and to a lesser extent in the United States) and set out at great length in such major legal works as François Gorphe's *Critique du Témoignage* (1925) and *L'Appréciation des Preuves en Justice* (1947) is so little known and appreciated in this country. For the results are far more staggering than Dr. Glanville Williams' short discussion would lead one to expect and they do indeed go to the very root of criminal proceedings as envisaged in this country, focused as these are exclusively on the evidence which can be elucidated and presented by witnesses to the

² Known as "wide-open" cross-examination in the United States as opposed to the unhappy "restricted" form practised there in Federal and the majority of State courts.

jury at the time of the hearing. It may indeed be doubted whether anything like justice can be done to the Continental, above all to the French, criminal system, or whether this system can be adequately understood at all without some explanation of French pre-trial investigation and procedure (which is, alas, expressly excluded from Dr. Glanville Williams' study). It is lack of attention to this elaborate mechanism of fact ascertainment which may well be responsible for the view frequently held in this country that the French trial appears concerned far more with argument than with fact.

The emphasis on cross-examination in English trials is, of course, like most other rules of our law of evidence, closely connected with, or hardly separable from, jury trial. It is to an examination of the jury itself, and to a marshalling of the arguments for and against the jury system that Dr. Glanville Williams devotes the closing part of his lectures, almost one-third of the printed book. It is hardly possible here to examine in detail the formidable case which the lecturer gradually builds up against what he calls at one point this "ephemeral body of amateurs" and at another, more graphically, "a kind of sacred cow of the legal system." This part of *The Proof of Guilt* makes, as this sample shows, exceedingly good and often amusing reading, but it strikes me as somewhat uneven in value. Side by side with weighty and well-recognised drawbacks of jury trial there are some surprisingly shallow assertions, such as "... the real reason for keeping the jury's deliberations secret, namely, the desire to preserve public confidence in a system which more intimate knowledge might destroy" (p. 205). Personally I regret above all the way the frailty of jurors tends to be used so widely by the legal profession itself as an argument to counter all efforts to relax some of the most restrictive of the exclusionary rules of evidence.

That jury trial may offer the guilty a better chance of acquittal than they might otherwise have, both directly and through the peculiar intricacies of the law of evidence as it stands, is admittedly one of the most serious objections which can be raised against it. But I hope I am not doing Dr. Glanville Williams an injustice if I suggest that, however powerful the case against the jury, his proposal for trial by three judges (pp. 232-233) or by an assessor system similar to the German *Schoeffengericht* would, to carry any conviction, require far more careful assessment of these alternatives (and their implications), and that his analogy between Peoples' Judges in the Soviet Union (and introduced since in other countries, including, e.g., Eastern Germany) and English Justices of Peace (p. 193) will strike many of his readers merely as touching.

Dr. Glanville Williams is right in saying that "The whole process whereby the effective administration of most of the criminal law has (gradually) been shifted from juries to magistrates is a striking vote of confidence in the magistracy by all concerned, if it is not also a vote against the efficiency of the jury system." Because he is plainly aware that "the principles of criminal procedure are not the product of scientific observations, but embody a system of values," one is tempted to regret that, on occasion, he has passed rather lightly over certain aspects of existing law and practice which would seem to pertain directly to his subject and appear to flout in a pretty obvious manner recognised "values." "At the present day," he writes, "we take the right to have counsel for granted," and his evident complacency on this score is undoubtedly shared by the overwhelming majority of lawyers in this country who have rarely stopped to consider the proper extent and scope of this right. In France, for instance, where the accused is *required* by law to be defended in every criminal trial at Assizes, lawyers would scorn the conception that the indigent accused's right to defence counsel appointed by the court begins only when his position may already be gravely prejudiced by a statement he may have been foolish enough to make to the police long before he was given an opportunity to consult counsel, and ends with the verdict or judgment upon appeal.

The latter point becomes significant when it is realised that in France (and in all other principal Continental countries) the defence can, in a proper case, apply to the Cour de Cassation for "*pourvoi en revision*" where fresh evidence has come to light at any time which forcefully suggests that an innocent man may be suffering sentence for a crime he has not committed. The absence in this country of any right to test the propriety of any sum that may be offered *ex gratia* in compensation for an acknowledged miscarriage of justice is rightly deplored by Dr. Glanville Williams, but he barely mentions the still more extraordinary refusal of English law to grant anything but an invidious "free pardon" to those who would seek justice after a wrongful conviction.

These are hardly more than footnotes added to an important book which cannot fail to be exceedingly stimulating for the wealth of significant ideas discussed with great clarity in comparatively little space, and for its author's remarkable ability to look at familiar aspects of the English trial with a fresh eye and an open mind.

H. A. HAMMELMANN.

THE UNITED KINGDOM: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS. (*The British Commonwealth Series, Vol. 1*) (Part 1: ENGLAND AND WALES, Northern Ireland and the Isle of Man) under the general editorship of GEORGE W. KEETON, M.A., LL.D., and DENNIS LLOYD, M.A., LL.B., with Specialist Contributors. [London: Stevens & Sons, Ltd. 1955. xiv and 523 pp. including index. £3 3s. net.]

THIS first volume of a series dealing with the laws of the British Commonwealth and their development is devoted to the United Kingdom, or more precisely to the laws of England and Wales, Northern Ireland and the Isle of Man. It is a collective work consisting of chapters written by different scholars specialising in each topic. The learned editors intend the book as a "survey of the most important developments in the law, and of some of the problems that have arisen as a result of these developments" (p. vii), a sufficiently vague formula to allow plenty of scope to the initiative of the individual contributors. This vagueness is, in fact, the main weakness of the book, for it is difficult to see what exactly is the purpose of this publication. Clearly it could hardly be addressed to students since its standard is too high and specialised, and in any case the method of broad generalisation is unsuitable to those unlearned in the law. Nor is it likely that foreign scholars will profit a great deal by it, since the treatment is on traditional English lines which do little to elucidate the gap that exists, say, between English and Continental law, both in terminology and concepts. It might then be thought that the book is concerned with the large number of lawyers from the British Commonwealth and the Anglo-American world in general, who could turn to the book for instruction as to the mechanics of the parent system. But it is doubtful whether this book can replace, as the first choice, the many excellent elementary books which are more detailed, more informative and more satisfying than this collection of short essays which is concerned with attitudes and trends rather than "the laws of the United Kingdom." One comes, therefore, reluctantly to the conclusion that the greatest benefit from this volume will be derived by English lawyers who will be stimulated by this often brilliant re-appraisal of their own system.

The book is divided into three parts; part one mainly deals with the sources, Administrative and Criminal law and the Constitution. Part two is devoted to private law. Part three is, perhaps, the least rewarding of

the book, since it is concerned with such traditionally non-legal subjects as, *e.g.*, the Nationalised Industries and the Social Services. It is true, of course, that many legal problems have arisen in recent years from such topics, but the contributors cannot be blamed if the comparatively little space which is given to them allows for no more than a highly compressed factual account of these topics. Some readers might well think that such headings as "Labour Exchanges and Training" or the position of, say, "Cable and Wireless" are not likely to arouse great enthusiasm or interest when no space is found for so important a topic as Private International Law.

These criticisms are concerned with the purpose and structure rather than the substance of the book. A different picture is obtained when we come to consider the individual chapters. Books written by several authors are notoriously uneven; it will be fair to say, however, that this book avoids all such criticisms while enjoying all the advantages of the combination. The introductory chapter by Professor Newark is a masterpiece of lucidity and is, probably, a chapter that, together with the sections on Northern Ireland and the Isle of Man, can be read with profit by a person new to the law. To single out one chapter, however, might be misleading, for at an advanced level, the remaining chapters of Parts One and Two are of uniformly high standard. Professor Lloyd's chapters on Precedent, etc. (see in particular pp. 23-24) and the Law of Tort and Procedure are a model of concise, accurate and well-balanced writing. If the author errs in any way, it is on the side of impartiality. As has already been said, this book is concerned with trends rather than facts. The reader is likely to find that the comments, which are always illuminating, compel him to re-think about the state of the law with a critical eye and often from a novel point of view. But the contributors do not lose sight of the fact that law reform is slow; thus their comments are, on the whole, modest and guarded.

While the stimulating character of these short essays must be emphasised, it would be wrong to give the impression that all is well. Some chapters are uncomfortably short, with the result that they read like a race to cover the vastness of the material within the prescribed limits. Such are, for instance, the chapters on the law of property and company law. Again, it is inevitable that the magnitude of the task will cause some points to be neglected or relegated to obscure phrases. Thus, *e.g.*, the section of the "Meaning of Fault" (p. 278) may be misleading since no clear explanation is given of absolute and relative rights. Professor Lloyd's defence of the particular theory of torts will not convince all readers, on the other hand his support of *Donoghue's* case takes no notice of what is known as Mr. Landon's school of thought. Elsewhere, it is suggested that the volume of reported decisions must be reduced, but no constructive suggestion is made as to how to avoid legislation by law reporters. These, however, are small matters of detail, and it is natural, and desirable, that no writer should satisfy all his readers.

Turning now to Part Three, Mr. Sheridan is to be congratulated for his achievement in compressing so much information in so small a space. The tragedy is that so much effort should have been wasted on such a fruitless task. On the other hand, the section of the Northern Irish legal system is outstanding. If a suggestion might be made here, it is that it should be preserved in a separate book, to be recommended to all students, who are surprisingly ignorant of such an interesting jurisdiction so closely associated with the mother country. Last but not least, Mr. Holland's chapter (is it Mr. Holland's? *vide* Introd. p. vii) on the Isle of Man is sure to be read with the greatest interest by all lawyers who consider that the quaint and the legal are inseparable. On the whole, there are hardly any inaccuracies and the book, which is well produced, is remarkably free from misprints. Oddly enough, however, the list of Statutes and Cases is to be found at the end of the book.

In conclusion, while this book is not likely to have the general appeal that the editors intended, it is, nevertheless, a book of outstanding merit and will be read with great profit by all those with some knowledge of English law, who might wish to acquire a critical *aperçu* of the laws of the United Kingdom.

A. G. CHLOROS.

THE UNITED KINGDOM: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION. (*The British Commonwealth Series, Vol. 1*) Part 2: SCOTLAND by T. B. SMITH; THE CHANNEL ISLANDS by L. A. SHERIDAN. [London: Stevens & Sons, Ltd. 1955. xii and 554 pp. and (Appendices, Tables and Indexes) 62 pp. £3 3s. net.]

THE volume on the United Kingdom in this excellent series has been rather awkwardly split into two parts so that the part dealing with Scotland and the Channel Islands appears in separate covers from that dealing with England and Wales, Northern Ireland and the Isle of Man, yet with the pagination and chapter numbering following on consecutively from the first part. It would in any event have been rather more appropriate geographically, historically and linguistically to put the Isle of Man rather than the Channel Islands in the same part of the volume as Scotland. Admittedly, however, considerations of bulk and the size of the whole volume as compared with other volumes in the series make the division understandable, and this policy has possibly given Professor Smith a rather freer hand than he might otherwise have had if an attempt had been made to keep the whole United Kingdom volume inside one set of covers. It is certainly better to have this than the chapter on Scotland tucked away at the end which is the treatment more usually accorded to Scots law. The division of the whole volume may, however, have the unfortunate consequence of permitting readers who are not buying the whole series to buy or read only the English part and ignore the Scottish one whereas one of the great merits of the whole volume and of this volume in the complete series is that, probably for the first time ever, it presents adequately the Scottish legal system as one of the distinctive systems of law co-existing in the Commonwealth. It is most sincerely to be hoped, as Professor Keeton remarks in the Preface to Part 1 of the volume, that this will do something towards extending the study of Scots law outside Scotland, and there can be no doubt that Professor Smith's contribution is well suited to this function.

The chapters on Scotland (which take up all but a dozen pages of the book) do not accord entirely with the sub-title of the series in that they do not deal primarily with the development of the law or of the constitution in Scotland. Rather is this book, certainly for the most part, a survey of the modern law, though it is fair to point out that the inadequate existing knowledge of Scottish legal history would not have rendered any extended study on historical lines possible, while much of the modern public law is the same as or similar to that described in the English part of the volume.

Professor Smith opens with a sketch of the historical background which brings the tale down to 1707 only and, while admitting that the detailed investigation necessary for confident generalisation about the later history of Scots law has not been done, it seems unfortunate that so little is said at this point about later developments, though it is true that in the subsequent discussion of many particular doctrines due regard is paid to the evolution of the doctrines in question. This may, however, tend to suggest that development stopped at 1707 and that everything thereafter emanated from London, which is not the case at all. But equally the teaching of Scottish history in schools tends to stop at 1707 and many Scots are most woefully

ignorant of post-1707 history. Then follow twenty pages dealing with the formal sources of the law. Among these the author rightly draws attention to the importance equity has had as a source, a factor frequently overlooked by commentators accustomed to the familiar pattern of dichotomy of law and equity. The absence of separate courts of equity and distinct equitable rights and interests has never meant that equitable pleas were ignored in Scotland; nor is the *nobile officium* of the Court of Session the whole of Scottish equity. So too stress is laid on the somewhat less rigid Scottish attitude to the doctrine of *stare decisis*.

The following chapter deals with particularly Scottish aspects of constitutional law, matters ignored in the customarily accepted books on the subject. Professor Smith lays stress on the pre-1707 subjection of the Scottish Crown to law and then considers the continuing fundamental importance of the Treaty of Union (which is reprinted in an Appendix) and the doubtful issue, notwithstanding Dicey, whether Parliament was acting *ultra vires* in altering, as it has done, certain provisions of the Treaty. He concludes that though "Parliament does not enjoy unlimited sovereignty, variations by that body of the fundamental legislation of the Union may now be held in many respects to be ratified by acquiescence. It is not, however, inevitable that every future variation will meet with general acceptance in Scotland." Again he rightly stresses that Parliament has under the treaty a power to alter the private law of Scotland only when it is "for the evident utility of the subjects in Scotland." In view of the suggestions that the practice of English brides eloping to Scotland should be checked by making Scots law also require parental consent for the marriage of infants this clause still has important potentialities. The chapter on the courts is satisfactory and should clarify much confusion. Noteworthy here is the lesser position occupied by the justices in Scottish practice; apart from burgh police courts they could be dispensed with without difficulty.

The section on criminal law is very well done; most interest here will probably centre on the detailed exposition of the defence of diminished responsibility and to the Scottish attitude to mentally abnormal criminals, a body of law and practice deserving of careful study elsewhere. This section, moreover, in view of the poverty of the current Scottish textbooks on criminal law deserves the careful attention of Scottish law students. The cardinal features of an almost entirely judge-made corpus of criminal law and a rational and simple, yet developed and adequate system are well brought out.

Possibly the least satisfactory part of the book is that on property. The scope and complexity of this branch of law, particularly the law relating to land and heritage, defies brief or simple statement but the order of discussion adopted does not seem quite the most suitable nor is the treatment wholly satisfactory; it is not that there are identifiable faults but one has the feeling that this was the section which was least congenial to write.

Professor Smith has not always played safe by setting out the accepted view nor has he always resisted the temptation to indulge in controversy. The notable instance of this is the discussion of the thorny topic of error in contract. The views he puts forward are not the conventional ones, yet his analysis of the cases carries conviction and it appears to the reviewer that he is correct in his attribution of much of the confusion to the extension of the term "essential error" to cases of material misrepresentation. He is certainly further correct in emphasising that the citation of many English decisions on mistake merely confuses the issue. Pre-1875 English authority may often be misleading owing to the dualism of law and equity.

The discussion of reparation is to be warmly commended in view of the common tendency, quite common even in Scottish practice and in utterances *ex cathedra*, to assume, or be deluded by the study of English books and cases or by incautious or unfounded dicta, that the law of reparation and the

law of tort are in most respects the same for all practical purposes. It is true that the result is frequently the same in both systems but the fundamental premises and processes of thought may be very different, as Lord Cooper several times tried to remind Scots lawyers. Thus the author emphasises the generality of the obligation to make reparation and the absence of any concept of particular duty in negligence (though in modern Scottish practice the delusive factors already referred to have made averment of particular duty common form in every case). Buckland might have found useful support for his views on the duty to take care in these pages.

Considered in its entirety there is no doubt that Professor Smith has written a most valuable conspectus of Scots law, scholarly, lively, and in many respects strikingly original; it can be commended as one to be read with interest and profit by many different classes of readers: common lawyers in England and abroad will see how distinct the Scottish system is and how a quite different legal approach works within a similar social, political and economic framework. Comparative lawyers will find this an accurate and comprehensive guide to all the main departments and principles of modern Scots law, and they should note how several times the author draws for support on Roman-Dutch law, a system very similarly placed in origins and present status *vis-à-vis* the common law; in numerous places too Professor Smith has mentioned common-law counterparts in procedure or terminology for the benefit of such readers. For both students and non-legal readers in Scotland it is far and away the best general and introductory (but not elementary) account of their legal system and its principles and it thereby satisfactorily fills a long-standing gap. Not least for Scottish lawyers, and even Scottish judges or judges who have to handle Scottish cases, it supplies a perspective view of the wood, not too confused by trees, which should frequently correct facile assumptions of identity with English rules or mistakes founded on the inadequacies and defective analyses common in older books. Professor Smith has at many points rightly directed pithy criticism at London ignorance of or apathy towards Scottish legal institutions, the abominable practice of "application to Scotland" sections in statutes, the long-unsatisfactory appellate jurisdiction of the House of Lords, the facile suggestion that Scots law is in many respects just a variant of common law, and the general identification of England with Britain and English law with the right and normal. Equally rightly he emphasises the individual qualities and distinctive merits of the Scottish system. Not least does he deserve credit for a book very much of which is based on original work and fresh examination of cases and principles. While taking full account of earlier work it is not just a synthesis or compilation but an important contribution to Scottish legal literature and it is to be hoped that it will receive the attention and study which it merits. There are one or two trivial errors: the Stair Society was founded in 1934 (p. 604n.), and the local judge is the Sheriff-Substitute (p. 628).

The final chapter, contributed by Mr. Sheridan, gives an interesting account of the vestigial legal institutions of the Channel Islands.

DAVID M. WALKER.

THREE GREAT SYSTEMS OF JURISPRUDENCE. By K. KAHANA KAGAN, M.LITT.(Cantab), Lecturer in Codes, Jews' College, London. [London: Stevens & Sons, Ltd. 1955. 199 pp. (index 7 pp.) and xii. 25s.]

THE word "jurisprudence" in the title of this book is the "imposing quadrisyllable," since the work is concerned with the "comparison" of three legal systems, the English, the Roman and the Jewish. There can be no valid objection to this use of the word. Austinian success in persuading so

many speakers of the English language to use the word "law" in a particular way is not paralleled by a like success with regard to his recommendation of the use of the word "jurisprudence." But there is one passage in the book where the use of the word "jurisprudence" is not merely extraordinary but suggests a confusion of ideas. The author writes:

"Neither is Jewish jurisprudence conceivable in different aspects: nor can it be specified in different compartments such as analytical jurisprudence, historical jurisprudence or ethical jurisprudence. This also is due to the fact that the justice of the Jewish system, which is actually the soul of the law, is built upon and includes the high principles mentioned. Therefore the jurisprudence and the positive law, which is the body of the Jewish system, is also not constricted and is therefore not confined or divided into different aspects such as analytical, ethical and the like."¹

The explanation of this passage may be that the author forgot the fact that writers who use the phrases "analytical jurisprudence," "historical jurisprudence" and "ethical jurisprudence" (the trichotomy is Salmond's), are referring to aspects of *theory about* law in general, and not to divisions of a legal system. Jewish law could provide data for each of the branches of jurisprudence (in the theoretical sense). The terms of Jewish law could be examined for the purpose of linguistic clarification; the development of Jewish law could be examined in the course of the formulation of evolutionary generalisations; the content of Jewish law could be examined in relation to theories of justice. The author's contention that Jewish law is implicitly based on justice might be used in a general theory of the nature of justice, or in a general theory of the relation of law and justice: such theorising constitutes the first two items of Salmond's list of the subject-matter of "ethical jurisprudence." Jewish law could furnish material for Stone's "philosophical jurisprudence," the equivalent, more or less, of Salmond's "ethical jurisprudence." "Philosophical jurisprudence," says Stone, is criticism of law in the light of theories of justice. Jewish law might stand up to such criticism and be passed as perfect, but it would still have been critically examined. The author's awareness of the juristic use of "jurisprudence" is shown by his statement: "Indeed jurisprudence, which is really the philosophy of law in general and in particular the philosophy of the basic theories of law, calls even more emphatically for an understanding of the psychology of human nature."²

The author's comparison is carried out on the grand scale—the general features of the three legal systems are presented. The broad generalisations of many kinds which the author propounds—he is most fertile in ideas—may be found stimulating by many. His most general hypothesis is that Roman law and English law had to develop the dualistic form of compounds of "law" and "equity" because they were not founded on justice, and their officials were not able to subordinate their development to the conception of justice. Of course, justice would keep "breaking in," but it had to contend with other ideas. On the other hand, "whereas other systems found it difficult to identify the concept of law with the idea of natural justice, the Talmudic lawyers never had to make any distinctions in their system between the two notions, since for them law and justice were in perfect harmony."³

¹ p. 137.

² p. 87. The author, nevertheless, often uses "jurisprudence" in the text as in the title. His association of "jurisprudence" with particular legal systems, a confusion of "particular jurisprudence" with "general jurisprudence," may have led to his misunderstanding of Salmond. He says (p. 133): "Salmond states that jurisprudence, in its specific sense as the theory or philosophy of law, is for English law divisible into three branches: analytical, historical and ethical." The introduction of the words "for English law" makes nonsense of Salmond.

³ p. 19.

In elaborating this hypothesis the author discusses a number of the institutions of the three legal systems, such as ownership and slavery, contract and trust, and many of the great juristic debates, such as those concerned with the nature of justice, the doctrine of the social contract, the relation of law and custom, the distinction between rights *in rem* and rights *in personam*. I have already quoted a sentence indicating that he discusses the relation of law and psychology. I can but select from this profusion of topics a few for comment.

The relationship between Roman law and English law is regarded by the author not as one of adoption of particular rules and institutions, though some borrowing of this kind did take place, but one of adoption of conceptual ordering.⁴ This is surely the correct solution of the problem of the relationship. In the formative years of English law the judges and lawyers were men who had studied Roman law, and though they took the content of the laws they made from English needs and customs, they must have been influenced by the Roman framework of ideas. But the author's confusion of law and jurisprudence reappears when he tells us that in the nineteenth century "the leading books on jurisprudence were written by scholars who were primarily civilians and whose concepts and illustrations were necessarily taken in large part from Roman law."⁵ It is true that Austin sought to do for English law what the German jurists had done for systems derived from Roman law. But the German jurists of the nineteenth century were not dealing directly with Roman law. Since its inception with the teaching of Irnerius at Bologna six centuries of "analytical jurisprudence" had "derived" broad concepts and principles from the texts which were "modern Roman law" but not Roman law conceptions and principles. For instance, as Rabbi Kagan himself shows in another part of the book,⁶ the civilians and canonists of the Middle Ages created a law of contract which did not exist even in the time of Justinian.

The author rightly points to the great distinction between "dominium" in Roman law, and "ownership" in English law. The failure to realise that this difference is fundamental has led to the many difficulties in juristic discussions of "ownership" which have assumed that some common or even "necessary" notion is present in both systems. In Roman law only one person was the *dominus* of a parcel of land: in English law there could be a number of estate owners. (It is assumed that we are not considering joint ownership.) The author rightly seeks for the explanation of the differences in the way of life of the two peoples. He tells us:

"The Roman people, whether as a nation or as individuals, had a mentality set on the acquisition of rights, power and status. Their idea of conquering the world was not expressed only in the attitude of the nation as a whole: each individual had the desire for conquest in order to possess power and dominium. This lust for domination is reflected in the rules and regulations of many institutions of the Romans, and it is plainly revealed in their institution and fundamental conception of property."

This is indeed a severe indictment of a people: and I do not think it can be justified even for the period of the Empire. It is also mistaken as an explanation of the origin of *dominium*. This is surely a corollary of *patria potestas*, and is derived from the "household gods," ancestor-worship, religion described by Fustel de Coulanges in *La Cité Antique*. The absolute

⁴ See p. 39 and p. 44. Kagan actually says: "Even Bracton and Glanville, in their own age, did not borrow very much from Roman principles and concepts of law and what they did borrow was the scientific way of classification and their terminologies."

⁵ p. 39.

⁶ p. 82.

legal powers of the *dominus* of the Republic were restrained by religious obligations and responsibilities. When the religious bonds were weakened in the Empire legal restrictions came into being. There is a parallel with feudal lordship. The feudal lord felt social restraints: as the "cash nexus" replaced the feudal tie so the law introduced legal restrictions.

Another distinction drawn by the author between institutions which might at first glance appear similar is that between praetorian law and English equity. But his treatment of the relation between common law and equity does not appear to me to be completely satisfactory. He appears to assume that only equity is capable of introducing flexibility and adaptability into English law. Small wonder that he deplores the transformation of equity under Lord Eldon and supports Denning L.J. in the cry for a new equity. It is to me a great wonder, however, that he ignores the expanding character of the common law though he quotes from Potter's *Quest of Justice* that "no common lawyer would have allowed that the common law was other than part of the moral law." There have always been common lawyers who have seen common law, as well as equity, linked with natural justice. The common law came into being in a Europe which accepted natural law, and it has not yet alienated this heritage of its birth.

A substantial part of *Three Great Systems* is devoted to examination of "social contract theory" for the purpose of showing that European theory on this subject is defective, while in Jewish history and Hebrew law there is a social contract which earns our admiration. "Social contract," we are told, cannot have been derived from Roman law for it had no law of contract. Has Roman law, however, been seriously linked with social contract? Justinian I.11.6 is a doubtful basis. If some such origin for the theory had to be demolished the absence of a private law of contract is not the appropriate weapon. Social contract is a conception of public law. Our author next observes that

"Rousseau's social agreement gave rise solely to rights *in personam* between the members of the community who entered into the undertaking."⁷

On the other hand,

"In Hebrew law, although the relationship did originate in agreement, yet once that agreement has been reached there resulted not a contract creating a right *in personam* but a social institution in which the participants created for themselves and for their successors a right *in rem*, an institution which enshrines justice in its broadest sense."

This use of the distinction between rights *in personam* and rights *in rem* in a new context illustrates the fascinatingly original way in which the author produces new arrangements of traditional legal concepts. I think, however, the elements here selected will not bear the new load. The author makes many references to Hohfeld in relation to other matters: it is in my opinion unfortunate that he accepts Sohm's treatment of rights *in rem* and rights *in personam* without regard to Hohfeld's analysis.

In his treatment of Roman law and English law the author relies too much on "textbooks" and other second-hand material. Of Jewish law he is a master; his references, when they appear, are generally to the texts so often ignored in "textbooks." When he refers to books about the laws, he usually refers to a Christian author to show that the enthusiasm for the Jewish legal system is not mere prejudice. He is indeed a powerful advocate for the justice of the rules and institutions of Jewish law. The slavery recognised by Jewish law is a humane institution. Maimonides says "One must treat his Hebrew slave as a brother." Maimonides in his hermeneutics anticipated some of the ideas of the linguistic analysts of today, and, according to Kagan, the Jewish

⁷ p. 112.

lawyers of Talmudic times put into practice the principles which are but a programme of the liberal jurists of today.

"In Hebrew law there was no necessity at all for any intervention against formal interpretation of texts. The reading of the texts of the Bible and the codes was not limited to the mere translation. Many of the words were considered as terminologies denoting ideas, concepts and notions. The Jewish lawyers preferred the broad and beneficial interpretation against the strict letter. Meanings of texts in Jewish law are not to be gathered from the mere literal sense of the words used but from the social purpose which lies behind the words, and if the free intuition of the judge was necessary it could also be used."⁸

The author's presentation of Jewish law in the company of Roman law and English law is itself a noteworthy contribution to comparative law and to jurisprudence. Moreover, his fertility of ideas in the course of his exposition calls for admiration. It will also provoke much discussion when the validity of his generalisations is sought to be tested. Two major considerations appear to me to have been overlooked. His treatment of English law is curiously limited almost to eighteenth-century private law. The great contributions of English law to the institutions of government are neglected; and the development of institutions by the social legislation of the nineteenth and twentieth centuries is almost entirely ignored. In the second place, I think that some reference ought to have been made to the characters of the political entities whose legal systems were being compared. The Roman and English nations constitute world powers. The Talmudic lawyers were dealing with the affairs of comparatively small communities, living for the most part under the sovereignty of other nations. This consideration is surely relevant to the author's discussion. In putting it forward I do not wish to be regarded as justifying the absence of justice from Roman and English legal rules and institutions. Nor do I wish in any way to diminish the importance and influence of Jewish law. Greek history and Jewish history alike testify to the power of spiritual forces. It has been said that philosophy comes from Athens. It has also been written "From Zion came forth the law, and the word of the Lord from Jerusalem."

J. L. MONTROSE.

CORRIGENDA

In the review of *Völkerrechtliche und Staatsrechtliche Abhandlungen*, at p. 231, Professor Bilfinger was mistakenly described as successor to Bruns in the directorship of the Kaiser Wilhelm Institut für ausländisches und internationales Privatrecht in Berlin. This should read: Kaiser Wilhelm Institut für ausländisches öffentliches Recht und Völkerrecht.

In line 5 at p. 472 of Professor Friedmann's article on "Property, Freedom, Security and the Supreme Court of the United States," the words "the court" should read "Congress."



⁸ p. 25. No references are given to Talmudic or other texts in support of these views.

THE MODERN LAW REVIEW

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